(17,417.)

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IN THE

Supreme Court of the United States.

October Term, 1899.

Filed April 6, 1900.

No. 803

SOUTHERN RAILWAY COMPANY,

Plaintiff,

vs.

POSTAL TELEGRAPH-CABLE COMPANY,

Defendant.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opening Brief for Plaintiff in Error.

ROBERT STILES, RICHMOND, VA.,
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EXPLANATORY PREFACE.

ief is so arranged under headings, and so analyzed
lex, that the reader may readily turn to the discus-
at topic which for him is the point of interest or of
in the cause, avoiding what he may regard as not
elucidation or argument.

s, orders and authorities are so listed, indexed and
at they may be read or passed at pleasure.

ff in error grounds its defense on the merits upon the
f any legal basis or authority for the proceeding of
i. e., appellant denies the right of the Telegraph
to condemn a right of way for telegraph purposes
property of the Railway Company.

ors of procedure appellant submits that the Superior
Guilford county was without jurisdiction of the pe-
d by the Telegraph Company, and that the Circuit
the United States for the Western District of North
had no greater jurisdiction than the State Court from
id petition and proceeding were removed, and that
edings of the Circuit Court have been in violation of
State or Federal, now in force.

INDEX.

	Page.
Index to Brief,	ii
Table of Cases,	iv
Statement of Case,	1–6
Code of North Carolina:	1–11
Section 1944, Code of 1883,	6–7
" " " " Amended,	12–13
" 1945, " "	7–8
" 1946, " "	8–10
" " " " Amended,	11–12
" 1952, " "	10–11
" " Repealed and New Act substituted,	12–13
Character of Statutory Changes,	11–14
Acts amending Sections 1944, 1946, and 1952,	11–13
Language stricken from Section 1944,	13
Language stricken from Section 1946,	13–14
Repeal of Section 1952 and Act substituted,	12–14
Code of North Carolina (continued):	
Section 2007, Code of 1883,	14
" 2009, " "	14
" 2010, " "	14–15
" 2011, " "	15
" 2012, " "	15–16
" 2013, " "	16
Order of September 15, 1898,	17–18

tober 24, 1898, . . . 17–18
on's Order Appointing Commissioners, 18
djudicated, ... 19
. 19–20
ocedure, ... 20
Authorizing Condemnation, . 20
on the Merits, . . . 20–22
Statutes, ... 21–22
on the Merits (continued), . . 22–24
olicy, ... 22–24
Compensation, . . . 22–24
Cited on Measure of Compensation, 25–29
n Merits (continued), . . 29–31
ncorporation, ... 31–33
ondemnation Statutes, . . 29–33
peal of Condemnation Statutes, . 29–33
on Repeal of Statutes, . . 33–39
Trial Court on Repeal of Statutes, 39–44
n Merits (continued), . . 39–44
Amendment to Constitution of U. S., 44
n Merits under Fourteenth Amendment, 44–52
Cited on this Point, . . . 46–52
f Proposed Condemnation, . 53–59
n Character of Proposed Condemnation, 53–58
on Character of Proposed Condemnation, 55, 58
rveys, ... 53–58
n Occupancy of Railroads by Others, 57–58
Condemn in One Proceeding, . . 58–63
n Condemnation in One Proceeding, 58–63
th Carolina, Sec. 2010, abstracted, . 59–60
of Sec. 2010 to Case at Bar, . 60–63

Action of Circuit Court on Demurrer, . . 63–70
Refusal to Hear Testimony, . . . 63–70
Obstruction to Railroad, ... 65–70
Conditions Precedent, ... 63–70
Clerk Appointed Commissions, . . 70–76
Court cannot delegate power to appoint comm'rs, 72–73
Clerk of U. S. Court cannot act judicially, . 72–76
Judicial power lodged in U. S. Courts, . . 72–73
Commissioners must View Premises, . . 73
Clerk Cannot Preside Over Commissioners, . 73–74
Action of Clerk, ... 75–76
When Telegraph Lines May be Constructed, 76
Construction without further order of Court, . 76–77
Eminent Domain Statutes Strictly Construed, . 77
Conclusion—Summary of Certain Points, . 77–78

TABLE OF CASES.

Adoption of Statutes.

	Page.
Endlich on Interpretation of Statutes p. 113, .	22
Regina *v.* Merionetshire, 6 Ad. & L. N. S., 342, .	31

Just Compensation.

Boom Co. *v.* Patterson, 98 U. S., 403, . .	25
Gulf, Col. & S. Fe Ry. *v.* Ellis, 165 U. S., 150, .	46–48
Monongahela Nav. Co. *v.* U. S., 148 U. S., 312, .	50
R. & M. Rd. Co. *v.* Humphreys, 90 Va., 42, .	26
San Diego Land Co. *v.* Neale, 78 Cal., 63, . .	26

Effect of Repeal of Adopted Statutes.

B. & P. R. R. Co. *v.* Grant, 8 Otto, 398, . .	36
Curran *v.* Owens, 15 W. Va., 224, . .	33
Ex parte McCardle, 7 Wall., 515, . . .	36
Insurance Co. *v.* Ritchie, 5 Wall., 544, . .	35
Medical College *v.* Muldon, &c., 46 Ala., 610, .	34
Musgrove *v.* V. & N. R. R. Co., 50 Miss., 681, .	34
Regina *v.* Denton, 14 Eng. L. and Eq., 127, .	33
Rachel *v.* U. S., 6 Cranch, 329, . . .	35
U. S. *v.* Goldenburg, 168 U. S., 102–3, . .	37

Rights of Appellant Protected by XIV Amendment to Constitution of United States.

Gulf Col. and S. Fe. Ry. *v.* Ellis, 165 U. S., 150, 46–48
Holden *v.* Hardy, 169 U. S., 390, . . 52
Monongahela Nav. Co. *v.* U. S., 148 U. S., 324, . 59

Survey and Map

Railroad *v.* Railroad, 106 N. C., 16, . . 55

Railroad's Exclusive Occupancy of Roadway.

Jackson *v.* Rutland & B. Rd. Co., 25 Vt., 150, . 58

Eminent Domain Statutes must be Strictly Construed and Statutory Powers Strictly Followed.

Adams *v.* Clarksburg, 23 W. Va., 203, . . 77
Binney's Case, 2 Bland's Ch., 99, 129, . . 77
Penna. R. R. Co.'s Appeal, 93 Pa. St., 159, . 77
Stewart *v.* Wallis, 30 Barb., 334, . . . 77

Any—the least—ambiguity or doubt whether a statute really grants a corporate right, especially the right of Eminent Domain, must be resolved against the corporation claiming the right. Doubt is fatal to the claim.

Charles River Bridge *v.* Warren, 12 Curtis R., 504, 77
Commonwealth *v.* E. & N. Railroad Co., 3 Casey, 351, 77
Miami Coal Co, *v.* Wigton, 19 Ohio St., 231, - 77
N. W. Fertilizing Co. *v.* Hyde Park, 97 U. S., 659, 77
Penna R. R. Co. *v.* Canal Commrs., 21 Pa. St. R., 22, 77

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IN THE

Supreme Court of the United States.

October Term, 1899.

No. 303.

SOUTHERN RAILWAY COMPANY,

PLAINTIFF,

vs.

POSTAL TELEGRAPH-CABLE COMPANY,

DEFENDANT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opening Brief for Plaintiff in Error.

STATEMENT OF CASE.

On June 11, 1898, the Postal Telegraph-Cable Company, hereafter called the Telegraph Company, a New York corporation having accepted the provisions of the Act of Congress, approved July 24, 1866, entitled: "An act to aid in the construction of telegraph lines, and to secure to the government

the use of the same for postal, military and other purposes," filed in the office of the clerk of the Superior Court of Guilford county, North Carolina, a petition making the Southern Railway Company, hereinafter called the Railway Company, the sole defendant, in which petition the Telegraph Company asked the condemnation, for its purposes as a telegraph company, of a continuous right of way along, upon and over the lands (roadway) of the Railway Company, from a point on the State line between the States of North Carolina and Virginia, where said railroad crosses the State line; thence south through the counties of Rockingham, Guilford, Randolph, Davidson, Rowan, Cabarras, and Mecklenburg to Charlotte, and from the town of Greensboro, in the county of Guilford, to the city of Raleigh, passing through the counties of Guilford, Alamance, Orange, Durham and Wake, and by an amended petition filed the same day, asked for a like condemnation from Greensboro, North Carolina, to Winston, in Forsythe county, North Carolina—the whole distance being nearly two hundred and fifty miles, and the larger part of the property sought to be condemned being situated within the Western District of North Carolina. See pp. 3–6 and 18–22 of record, the reference to section 5268 U. S. Rev. Stat, being on p. 19.

A summons was issued requiring the Railway Company to appear before the clerk of the Superior Court of Guilford county on the 22nd day of June, 1898, and answer, and on that day the Railway Company entered a special appearance for that purpose, and filed a petition and bond, for the removal of the proceeding to the Circuit Court of the United States for the Western District of North Carolina. Upon the same day, said petition and bond were presented to said Court and application made to it by counsel for the Railway Company to enter an order removing the cause to the Circuit Court of the United States; but the State Court denied the application to remove, and made an order requiring the Railway Company to answer. Thereupon, the Railway Company procured a transcript of the record from the clerk of the State Court and filed

e same in the clerk's office of the Circuit Court of the United ates at Greensboro, N. C., on June 25th, 1898.

Subsequent to June 22, 1898, the Telegraph Company sought take further action in the State court in said proceedings to ndemn, and upon a bill filed by the Railway Company in e Circuit Court of the United States at Greensboro, a re-aining order was granted prohibiting further prosecution of e cause in the State court.

The Telegraph Company moved the Federal court to remand d proceeding to the State court, and the Railway Company ved said Federal court to continue the restraining order in ce as an injunction. These motions were argued at Ashe-le on or about the 14th day of July, 1898, and on the 20th July, 1898, the court filed its written opinion, refusing to mand the proceeding to condemn to the State court, and lding that the restraining order must be continued in force til the further order of the court.

On August 18, 1898, the Telegraph Company asked leave of e Federal court to file another petition in which it took the ound that it had a right under the above Act of Congress July 24, 1866 to construct its telegraph lines "without ob-ction, hindrance or delay." The court continued this appli-ion until August 31, 1898, and then allowed this petition to filed.

On August 31, 1898, the Railway Company filed its written tion to dismiss said petitions of the Telegraph Company d each of them, assigning sixteen grounds therefor. See ord, pp. 81–85, inclusive. The motion to dismiss was over-ed, as to petition filed in the Superior Court of Guilford nty, by order erroneously dated August 31, 1898. See ord, p. 24, "Defendant's Bill of Exceptions, No. 1," record 25–26, and opinion, pp. 26–33.

On September 15, 1898, the Circuit Court made an order by ich it directed Samuel L. Trogdon, clerk of that court at eensboro, N. C., to appoint three commissioners to assess mages, prescribed their powers and duties, and otherwise

ordered as set out in said order, the full text of which may be found at page 16 of this brief. See record, p. 36, and "Defendant's Bill of Exceptions, No. 2," pp. 39–40.

On September 19, 1898, Samuel L. Trogdon, clerk, made an order appointing three commissioners to assess damages, and fixing the time and place for their first meeting, and on the same day issued a paper notifying appellant of his action in the premises. See record, pp. 37–38, and "Defendant's Bill of Exceptions, No. 2," pp. 39–40.

These orders were made upon application of counsel for the Telegraph Company, without notice to or knowledge of counsel for the Railway Company. Immediately upon hearing of said orders, counsel for the Railway Company brought the matter to the attention of the court, and an order was made by the court on September 23, 1898, suspending the order of September 15, 1898, and requiring the Telegraph Company to show cause on October 7, 1898, why the Railway Company should not be permitted to file its answer and have the order of September 15, 1898, vacated and annulled. See record p. 40.

On October 7, 1898, the parties plaintiff and defendant, by their attorneys, appeared before the court, and the Railway Company tendered and asked leave to file its answer. The court, over the written objection of the Telegraph Company, (record pp. 54–55), announced its purpose to allow the Railway Company to file said answer, which will be found at record pp. 41 to 55, and the Telegraph Company demurred *orally* to said answer, but the order filing said answer and noting said demurrer was not made until October 24, 1898. See record pp. 58–59*

The oral demurrer to the answer of the Railway Company was argued October 7, 1898, and on October 17, 1898, the court filed a written opinion sustaining this demurrer. See record pp. 56–58.

* The paper headed "Demurrer to Defendant's Answer," record pp. 54, 55, was really the answer tendered by the Telegraph Company to the order of September 23, 1898, requiring that Company to show cause. It was not the demurrer. The heading is erroneous.

On October 24, 1898, the court made an order filing the an-
er of the Railway Company, noting the demurrer of the
egraph Company and sustaining said demurrer. *The Rail-
y Company then asked leave to introduce testimony sustaining the
rments of its answer, but the court in said order overruled this
ion and refused to permit the Railway Company to introduce testi-
ny.* The court also reinstated its order of September 15,
8. To all of which ruling the Railway Company excepted.
order of court pp. 63–64 and defendant's bill of exceptions,
2 and 3, pp. 39, 40, 62.

On October 24th, 1898, the Railway Company asked for a
t of error and supersedeas to the order of October 24, 1898.
s application, on the motion of the Telegraph Company, was
tinued until November 4, 1898. See order record p. 74,
neously headed "Order Refusing Appeal." On November
898, a petition for an appeal, together with an assignment
rrors, was presented to the Circuit court, and will be found
pp. 66–72 record. On November 9, 1898, the court filed an
nion and made two orders, one of which recited the facts
above stated, and the other refused the Railway Company
writ of error prayed by it. See record pp. 72–75.

n November 29, 1898, the Circuit Court set aside the last
ntioned order and allowed the writ of error and supersedeas
rayed in the assignment of errors theretofore filed. See
rd p. 80.

n the 30th of March, 1898, the Circuit Court of Appeals
l an opinion, holding that no appealable order had been
le by the Circuit Court, and on March 31, 1899, made an
er dismissing the writ of error for want of jurisdiction.
cause was then brought by writ of error to this court,
proper bond having been given, the writ of error operated
supersedeas; but, upon application of the appellee, this
rt, in October, 1899, vacated the supersedeas.

The court, however, refused to dismiss the writ of error, after full argument on the point, and we take that action to be a final adjudication that THE ORDER OF OCTOBER 24, 1898, WAS A FINAL ORDER.

We deem it most conducive to the convenience of the court to insert just here, in consecutive order, under two heads, and extending continuously from this point to page 16 of this brief all the

STATUTES OF NORTH CAROLINA TO WHICH REFERENCE WILL BE MADE THROUGHOUT THIS ARGUMENT.

First. Statutes governing condemnations by Railroad Companies.

Section 1944 of North Carolina Code of 1883.

The first paragraph of section 1944 is as follows: the balance being, for the purpose in hand, unimportant, is omitted.

"Sec. 1944. PETITION PRESENTED; CHARACTER OF; NAMES AND PLACES OF RESIDENCE TO BE GIVEN; COPY OF PETITION MUST BE SENT TO SUPERIOR COURT. 1871–'2, c. 138, s. 14.

"For the purpose of acquiring such title the said Company, or the owner of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal to the superior court of the county in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state that the company is duly

rated, and that it is the intention of the company in ith to construct and finish a railroad from and to the amed for that purpose in its articles of association, or arter; that the whole capital stock of the company has good faith subscribed, as required by this chapter, or erms of its charter; *that the company has surveyed the oute of its proposed road, and made a map or survey thereof, such route or line is designated, and that they have located d road according to such survey, and filed such certificates ocation, signed by a majority of the directors of the company, rk's office of the several counties through or into which the d is to be constructed;* that the land described in the peti- equired for the purpose of constructing or operating osed road; and that the company has not been able to title thereto, and the reason of such inability. The , whether filed by the company or the owner of the ust also state the names and places of residence of the so far as the same can by reasonable diligence be ascer- who own or have, or claim to own or have, estates or s in the said real estate; and if any such persons are their ages, or as near as may be, must be stated; and uch persons are idiots or persons of unsound mind or nown, that fact must be stated, together with such other ons and statements of liens or incumbrances on said ate as the company or the owner may see fit to make. of such petition, with a notice of the time and place, nd where, the same shall be heard by the superior ust be served on all persons whose interests are to be by the proceedings, at least ten days prior to the hear- he same by the said court."

Section 1945 of Code.

n 1945 is as follows:

945. ALLEGATIONS MADE AGAINST PETITION; FREEHOLD-OINTED TO APPRAISE ESTATE. 1871–'2, c. 138, s. 15.

On presenting such petition to the superior court as aforesaid, h proof of service of a copy thereof, and notice as afore- l, all or any of the persons whose estates or interests are to affected by the proceedings, may answer such petition and w cause against granting the prayer of the same, and may prove any of the facts alleged in it. *The court shall hear the ofs and allegations of the parties, and if no sufficient cause is wn against the granting the prayer of the petition, it shall make order for the appointment of three disinterested and competent eholders* who reside in the county where the premises are to appraised, for the purposes of the company, *and shall fix the e and place* for the first meeting of the commissioners."

Section 1946 of Code.

Section 1946 is as follows:

"Sec. 1946. COMMISSIONERS TO BE QUALIFIED TO ISSUE SUB-ENAS, ADMINISTER OATHS, TO ADJOURN, TO APPRAISE AND REPORT DER HANDS AND SEALS; EITHER SIDE MAY FILE EXCEPTIONS FORE CLERK; MAY APPEAL; UPON PAYMENT OF SUM APPRAISED, MPANY TO ENTER AND TAKE POSSESSION DURING APPEAL; FINAL DGMENT; COURT TO HAVE POWER TO ENFORCE JUDGMENT; LAND BELONG TO COMAANY DURING ITS CORPORATE EXISTENCE; POS-SSION OF LAND NOT CONDEMNED TO BE SURRENDERED TO OWNER, .; COSTS AT THE DISCRETION OF JUDGE OR COURT. 1871-'2, C. 8, ss. 16, 17, 18.

"The commissioners, before entering upon the discharge of eir duties shall take and subscribe an oath that they will irly and impartially appraise the lands mentioned in the peti-on. Any one of them may issue subpœnas, administer oaths witnesses, and any two of them may adjourn the proceedings efore them from time to time, in their discretion. Whenever ey meet, except by the appointment of the court or pursuant adjournment, they shall cause ten days' notice of such meet-g to be given to the parties who are to be affected by their roceedings, or their attorney or agent. They shall view the

escribed in the petition, and hear the proofs and of the parties, and reduce the testimony, if any is hem, to writing; and after the testimony is closed e, and without any unnecessary delay, and before to the examination of any other claim, a majority being present and acting, shall ascertain and deter- mpensation which ought justly to be made by the the party or parties owning or interested in the ppraised by them; *and in determining the amount of sation they shall not make an allowance or deduction on ny real or supposed benefits which the parties in interest rom the construction of the proposal railroad.* They the same to the court under their hands and seals, twenty days after filing the same any person inter- said land may file exceptions to said report, and termination of the same by the court, either party edings may appeal to the court at term, and thence, ent, to the Supreme court. The court or judge on may direct a new appraisal, modify or confirm the ake such order in the premises as to him shall and proper. If the said company, at the time of al, shall pay into court the sum appraised by the ers, then and in that event the said company may possession of, and hold said lands, notwithstanding y of the appeals, and until the final judgment ren- id appeal or appeals. And if there shall be no ap- he final judgment rendered upon said petition and , shall be in favor of the company, and upon the said company of the sum adjudged, together with d counsel fees allowed by the court, into the office of the superior court, then, and in that event, all have been made parties to the proceedings shall and barred of all right, estate and interest in such during the corporate existence of the company A certified copy of said judgment under the seal shall be registered in the county where the land

is situate, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings, as deeds for land are now allowed to be read in evidence. All real estate acquired by any company under and pursuant to the provisions of this chapter, for the purpose of its incorporation, shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to said company. And the company shall have no right to hold said land not condemned, but shall surrender the possession of the same on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. The costs in this proceeding shall be paid by either party as the judge or court in its discretion shall adjudge. The commissioners shall each be entitled to three dollars per day for each day they are engaged in the performance of their duties, and the same shall be taxed in the bill of costs."

Section 1952 of Code.

Section 1952 is as follows:

"SEC. 1952. MAPS OF ROUTE TO BE MADE; NOTICE GIVEN TO OCCUPANTS OF LAND; SUPERIOR COURT PETITIONED WHEN ROUTE IS OBJECTIONABLE; NO ALTERATION OF ROUTE ALLOWABLE, UNLESS, &c.; TIME OF CERTIFICATE; COMPENSATION. 1871–'2, c. 138, s. 24.

"Every company, before constructing any part of their road into or through any county named in their articles of association or charter, shall make a map and profile of the route intended to be adopted by such company in such county, which

shall be certified by the president and engineer of the company or a majority of the directors and filed in the office of the clerk of each county through which the road is to be made. The company shall give a written notice to all actual occupants of the land over which the route of the road is so designated and which has not been purchased by or given to the company of the route so designated. Any party feeling aggrieved by the proposed location may, within fifteen days after receiving notice as aforesaid, apply to the superior court by petition duly verified, setting forth his objections to the route designated, and the said court may, if it considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and after hearing the parties, to affirm or alter the same as may be consistent with the just rights of all parties and the public, but no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall within thirty days after their appointment be made and certified by them and the certificate filed in the office of the county clerk. Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment, and if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount so paid."

Sections 1944, 1946 and 1952 have been amended or changed by the following Acts:

Chapter 160, Acts of 1891.

An act to amend section one thousand nine hundred and forty-six of the Code, in relation to the assessment of damages.

The General Assembly of North Carolina do enact:

Sec. 1. That section one thousand nine hundred and forty-six of the Code be, and the same is hereby, amended by striking out all after the word "them" in line twenty-one of said section down to and including the word "railroad" in line twenty-four: "*Provided, however*, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding, and shall not have a judgment for the excess of benefits over the damages."

Sec. 2. This act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1891.

Chapter 396, pages 391-2, Acts 1893.

"An act to amend chapter forty-nine of the Code, in relation to condemning land for right of way for railroads.

"*The General Assembly of North Carolina do enact:*

"Sec. 1. That section one thousand nine hundred and forty-four of chapter forty-nine of the Code be amended by striking out in said section all from the word 'charter' in line sixteen of said section down to and including the word 'constructed' in line twenty-four thereof.

"Sec. 2. That (section) one thousand nine hundred and fifty-two of chapter forty-nine of the Code be repealed, and the following substituted in lieu thereof: That whenever it shall become necessary to condemn any land for the purposes of a railroad that at the time that the summons for such condemnation is served, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the

land so sought to be condemned, and at what points on such land such cuts and embankments are located.

"Sec. 3. That section one thousand nine hundred and fifty-three of chapter forty-nine of the Code be amended by striking out from the word 'thereby' in line four down to and including the word 'change' in line seven of said section.

"Sec. 4. That this act shall not affect any pending litigation.

"Sec. 5. That this act shall be in force from and after its ratification.

"Ratified the 6th day of March, A. D. 1893."

Language Stricken from Section 1944 by Acts of 1893.

In other words, the Legislature amended and changed Section 1944 by striking out the following words, viz:

"That the Company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed."

Language Stricken from Section 1946 by Act of 1891.

And the Legislature amended and changed section 1946, by striking out the words first below quoted; with a saving clause or proviso quoted lower down in italics, viz:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

The proviso is as follows:

"*Provided, however, that in case the benefits to the land caused by the erection of such railroad be ascertained to exceed the damages to said land, then the said railroad company shall pay the costs of the proceeding and shall not have a judgment for the excess of benefits over the damages.*"

Section 1952 was repealed and the second section of chapter 396, pages 52-53, Acts of 1893, copied above, substituted in lieu thereof.

Second. Sections of the Code of North Carolina, edition of 1883, governing condemnations by Telegraph Companies.

"Sec. 2007. TELEGRAPH LINES, WHO MAY MAINTAIN. 1874–'5, c. 203, s. 2.

Any telegraph company chartered or incorporated by this or any other state shall have the right to construct, maintain and operate lines of telegraph along any railroad or other public highway in the State of North Carolina, but such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway."

"Sec. 2009. ENTITLED TO RIGHT OF WAY UPON JUST COMPENSATION. 1874–'5, c. 203, s. 4.

"Such telegraph company shall be entitled to the right of way over the lands, privileges and easements of other persons and corporations, and the right to erect poles and establish offices, upon making just compensation therefor."

"Sec. 2010. PROCEEDINGS TO BE BY PETITION; FACTS TO BE STATED. 1874–'5, c. 203, s. 5.

"Whenever such telegraph company shall fail on application therefor to secure by contract or agreement such right of

way for the purposes aforesaid over the lands, privilege, or easement of another person or corporation, it shall be lawful for such telegraph company, first giving security for costs, to file its petition before the Superior Court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant: Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easem
right of way extends."

nt or

Sec. 2011. COPY OF PETITION AND NOTICE TO BE SERVED ON PERSONS CLAIMING LANDS, &C., 1874–'5, C. 293, S. 6.

"A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the person or persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. If the person on whom the service is to be made be a corporation, it shall be sufficient if notice be served on an officer or agent of the corporation found in the county in which the land or easement is situated, or upon any other officer of the corporation."

Sec. 2012. PROCEEDINGS FOR CONDEMNATION, APPOINTMENT OF COMMISSIONERS, THEIR REPORT, EXCEPTIONS THERETO; APPEAL.

FINAL JUDGMENT, &C., TO BE AS PROVIDED IN THIS CHAPTER IN CONDEMNING, &C., FOR RAILROADS.

"The proceedings for the condemnation of lands, or any easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads."

Sec. 2013. COMMISSIONERS MAY INSPECT THE PREMISES. 1874–'5 c. 203, s. 9.

"In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on testimony as to them may be satisfactory, and the costs of the proceeding shall be paid by the petitioner, unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

THE THREE SUBSTANTIVE AND CRUCIAL ORDERS ENTERED IN THE PROGRESS OF THE PROCEEDINGS IN THE TRIAL COURT.

The orders of the Circuit Court dated September 15, 1898, and October 24, 1898, are as follows:

Order of September 15, 1898.

"It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this dis-

ct, and summons them before him. That the said persons selected shall act as commissioners to assess the dama- which the Southern Railway Company may sustain reason of the erection of the telegraph poles and the stretch- of the wires thereon of the Postal Telegraph-Cable Com- y, as proposed in the petition of said Company to this rt. That the said commissioners shall take before the said rk the oath prescribed in section 1946 of the Code of North rolina, and shall proceed in all respects as required in said le in assessing such damages, estimating and assessing such npensation as may be just for said Southern Railway Com- y by reason of the premises. The said commissioners ll hold their meetings in the courthouse of the United tes, in the city of Greensboro, over which meetings said rk shall preside, and they are authorized and empowered ake such testimony in respect to the said damages to the d Southern Railway Company as they may deem perti- nt, not, however, extending their inquiry as to the benefit be derived by the Telegraph Company, or the value reof, to it: The first meeting of the commissioners, of ich the said clerk shall give due notice to them and to the ties, shall be held ten days after notice of their appoint- nt has been served on the parties to this cause.

After hearing the evidence and reaching their conclusion, said commissioners shall reduce their award to writing, l sign and seal the same and file it with the said clerk of s court at Greensboro." See record, p. 36.

Order of October 24, 1898.

This day came the defendant Railway Company and by ve of court filed its answer to the complainant's written ice and motion to which said answer the plaintiff Telegraph mpany demurred, and after argument of counsel, and the tter being duly considered by the court, said demurrer is eby sustained, and the defendant having asked leave to

introduce testimony sustaining the averments of its answer which leave was refused by the court—

"It is therefore ordered, that the former order made by this court directing the clerk of this court, at Greensboro, North Carolina, to appoint commissioners to assess the damages in the above entitled cause, is hereby reinstated; and the clerk of this court is directed to fix a day not earlier than ten days after the entry of this order, for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts." See record, pp. 58–59.

The order by which Sam'l L. Trogdon, Clerk, appointed Commissioners to Assess Damages, omitting caption, record p. 37, is as follows:

"*To Alfred M. Scales, John M. Walker, and J. Addison Hodgin:*

"Pursuant to an order made by His Honor Chas. H. Simonton, on the 15th day of September, 1898, to me directed, in the above-entitled cause, commanding me to summon three disinterested freeholders as Commissioners to assess the damage of the said Southern Railway Co., which may accrue to same by the reason of the construction of a line of telegraph along the right of way by the plaintiff, the Postal Telegraph-Cable Co., and to fix a time for the assembling of said commissioners, and the taking of testimony bearing upon the issues by them to be tried; I have this day appointed as commissioners in said cause, Alfred M. Scales, John M. Walker, and J. Addison Hodgin, residents of the county of Guilford, N. C., of such appointment you will, therefore, take notice of, and you are hereby summoned to appear and sit upon the hearing of the said cause in the court room of the U. S. Circuit Court in Greensboro, N. C., on September 30th, 1898, at 10 o'clock A. M., and herein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal of this court.

(Signed.) SAM'L L. TROGDON,
Clerk.

[Seal.]

QUESTIONS ADJUDICATED.

e Circuit Court by its order of October 24, 1898.

. Determined that North Carolina statutes are in force
ler which the telegraph company may condemn a right
vay for its purposes upon the property of the railroad.
. Prohibited testimony showing the value for telegraph
poses of the property to be condemned.
. Determined that the condemned right of way for tele-
ph purposes may be unfixed, shifting and changing as to
ation.
. Determined that the entire condemnation may be had
one proceeding upon a strip of land, much of which is
d in fee-simple (by the railway company) belonging to a
gle owner and extending through twelve different counties
istance of nearly two hundred and fifty miles.
. Determined upon demurer that every defense set up in
answer of the railway company is without merit, even
ugh it were proved by conclusive evidence.
. Refused to hear proof as required by section 1945 of the
le of North Carolina.
. Determined without proof conditions precedent to con-
nnation under the North Carolina statutes.
. Delegated to its Clerk the power of selecting and ap-
nting commissioners to assess damages and authorized
Clerk to preside over such commissioners.
. Delegated to its Clerk powers vested in the court and
he court only.
o. Determined that the telegraph company may condemn
e possession of, construct its lines upon, exercise domin-
over and use the land of the railway company before the
ry of any further order by the court.

MERITS.

The Railway Company grounds its defence on the merits,

upon the absence of any legal basis or authority for the proceeding of the Telegraph Company; *i. e.*, the Railway Company denies the right of the Telegraph Company to condemn a right of way for telegraph purposes upon the property of the Railway Company.

ERRORS OF PROCEDURE.

(*a*) The Railway Company submits that the Superior Court of Guilford county was without jurisdiction of the petition filed by the Telegraph Company, and that the Circuit Court of the United States for the Western District of North Carolina had no greater jurisdiction, in the premises, than the State Court from which said petition and proceeding were removed.

(*b*) If, however, this honorable court should hold that legal authority exists for the condemnation by the Telegraph Company of a right of way for its purposes upon the property of the Railway Company, and that the State Court and the United States Circuit Court lawfully entertained jurisdiction of the proceeding, yet the Railway Company submits that the proceedings of the Circuit Court have been in violation of any law, State or Federal, now in force.

And, first, upon the merits—our fundamental proposition is that

I.

THERE IS NO LAW IN EXISTENCE UNDER WHICH A TELEGRAPH COMPANY MAY IN NORTH CAROLINA CONDEMN A RIGHT OF WAY FOR ITS PURPOSES UPON THE STRIP OF LAND CONSTITUTING THE ROADWAY OF A RAILROAD COMPANY.

Discussion on Merits.

Our position will be developed by the following brief analysis of the statute law of North Carolina applicable to the subject under discussion:

Eminent Domain statute of North Carolina, claimed by egraph Company to be applicable to the case at bar, is ınd in chapter 49 of the Code of 1883, which embraces 1932 to 2013, inclusive. The Eminent Domain por- the chapter is actually divided and naturally presents two distinct parts, to-wit: Section 2007 to 2013 inclu- ıbodying the law expressly and originally designed for *companies*—and sections 1943 to, say, 1953 inclusive, ly enacted for the purpose of giving and regulating the o condemn lands to the use of *railroad companies*. Sec- 12 is the connecting link between these two parts or s. Its full text may be found on pp. 15–16, *supra*.

acted appropriately to our present purpose, the section, ıg the heading, may be read as follows:

*proceedings for the condemnation of lands, or any easement st therein, for the use of telegraph companies * * * ıs prescribed in this chapter for condemning lands to the use ads.*"

ıoment the petitioning Telegraph Company in a con- on proceeding starts to follow the chart placed in its y this section, it is met at the threshold by a question emands instant answer, to-wit:

my "proceedings" follow the track of railroad con- on, as prescribed in chapter 49, as it stood in the Code ; or, shall they conform to chapter 49 as it stands to- h all amendments engrafted upon it since 1883?

Telegraph Company, in the case at bar, on the first its first petition, page 3, said: "And by virtue of chap- f the Code of North Carolina of 1883, and *the Acts of ral Assembly of said State amendatory thereof*, desires to ct, maintain and operate a line of telegraph along and e right of way of the Southern Railway Company, *" (italics ours). We take issue with the petitioner osition. Under section 2012 the petitioner has and

had no right in or under any amendment of chapter 49 of the Code.

Principle and precedent unite to establish the soundness of this position. The considerations of reason and common sense in support of it are obvious. The Legislature is presumably familiar with the statute law as it stands at the moment it makes reference to it, and has, presumably, determined upon the applicability of the law, as it stands, to the purpose for which the reference is made and the purpose to which the law is to be applied. It cannot be thus familiar with the law, as it shall stand next year; it will not therefore be presumed to have determined that the law, as it may be amended next year, or any succeeding year, will be applicable and appropriate to the purpose to which it is to be applied to-day.

Endlich on Interpretation of Statutes.

Says "Endlich on the Interpretation of Statutes," pages 113, 114:

SEC. 85. *Meaning of words at Date of Enactment.*—The rule which requires the construction of statutes with reference to their objects and subject-matters, obviously also requires the language of a statute, as of every other writing, to be construed in the sense which it bore at the period when it was passed. * * * Upon the principle stated seems to rest the rule, that an act adopting by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not adopt any subsequent addition thereto or modification thereof."

MEASURE OF COMPENSATION—CHANGE OF POLICY.

Since the enactment of the Code of North Carolina in 1883, not only the mode of procedure "for condemning lands to the use of railroads," but *the policy of the Legislature in determining*

iples which shall govern in ascertaining just compensation erty taken under the right of Eminent Domain, have under-dical changes. We respectfully submit that the Legis-as, by enactment subsequent to the Code, declared in e that the mode of ascertaining just compensation ed by chapter 49 of the Code of North Carolina, shall onger followed; that public policy in this regard has ; that old rules and principles have been swept away; Legislature, for reasons satisfactory to itself, has fallen with a public policy adopted in other States.

change was introduced by the amendment of Section he Code, by subsequent statute;—see Acts of 1891, page

oint involved is practically the most vital and impor-he statute, the point toward which all the balance of moves and tends, to-wit: The estimation of the "com-n" which the land owner shall receive for his property r public use; the determination of the rules and prin-which that "just compensation," guaranteed to the y the supreme law of the land, is to be calculated. aseology of section 1946 (pp. 8 and 10, *supra*), on this ior to the amendment referred to, was as follows:

in determining the amount of such compensation ll not make an allowance or deduction on account of or supposed benefits which the parties in interest ive from the construction of the proposed railroad."

mendment introduced by the law of 1891, consisted in striking out" and repealing the clause above quoted, nserting the following proviso:

ided, however, that in case the benefits to the land, the construction of said railroad, be ascertained to exceed ges to said land, then the said railroad company shall pay of the proceeding and shall not have a judgment for the benefits over the damages."

cally, the sole advantage resulting to the land owner

from this proviso, is the assurance that the condemning company shall not have a judgment against him for the excess of the benefits over the damages. He has, however, lost the protection afforded him by the law as it originally stood in section 1946 of the Code, which, as stated, authorized him to prove the entire amount of his damages, without the same being offset or reduced by any real or supposed benefits estimated to have accrued to his property by the public improvement to be constructed upon it.

As it originally stood in Section 1946 of the Code that clause forbade the commissioners to make "*allowance* or *deduction* on account of any real or supposed benefits which *the parties in interest* may derive from the construction of the proposed railroad."

What is the force of this enactment? Does it not include in its scope and sweep the benefits which *both parties to the proceedings* may derive from the construction of the proposed railroad?—"the parties in interest," both parties, plaintiff and defendant, corporation and citizen, land loser and land getter.

As we understand it, the General Assembly of North Carolina, in originally enacting section 1946 of the Code of 1883, *assumed* that, unless expressly prohibited from so doing, commissioners or appraisers, appointed by the court for that purpose, would ascertain "*just compensation*" to the landowner, by having in view the same considerations which govern a sale of property between private parties; by having in view all and the most valuable uses to which the property may be applied; that is to say, by having "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future," 98 U. S., 403; by having reference to the availability of the property for the uses for which it is wanted by the condemning corporation. In a word, by following the principles announced by this court in the leading case of

98 U. S., 403.

In *Boom Company* v. *Patterson*, 98 U. S. 403, Mr. Justice Field, in delivering the opinion of this court, pp. 407–408, said:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in con-

structing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

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90 Va., 425.

In *R. & M. Railroad Co.* v. *Humphreys*, 90 Va., 425, the third instruction of the trial court (p. 436) was as follows:

"3d. The court further instructs the jury that the amount to be awarded Thomas F. Humphreys for his land taken, including the embankment, abutment, and piers upon said land, or belonging thereto, is the fair cash market value of the said land, embankment, abutment, and piers so taken, at the time of the taking, and said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking."

And the Supreme Court of Appeals of Virginia (at p. 436) said:

"These instructions, and especially the third and last one, given by the court in lieu of those asked for on behalf of the defendant, are so logically adapted to the principles applicable to the peculiar circumstances of the case in hand, that no argument is needed to enforce them. The question presented has been clearly and definitely settled by the highest court in the land, and the doctrine there held has been recognized and enforced by many other courts of very high authority. In *Boom Company* v. *Patterson*, 98 U. S. R., 403, the Supreme Court of the United States has so clearly stated the doctrine as to leave no room for doubt."

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78 Cal., 63.

"In *San Diego Land, etc.* v. *Neale*, 78 California, R. 63, Hayne,

C. (in delivering the opinion at pp. 69–71, adopted by the court, p. 79) said :

" In *Boom Co.* v. *Patterson*, 98 U. S. 403, three islands in the Mississippi river were sought to be condemned for the purpose of a boom or storing-place for floating logs. For general purposes the property was of insignificant value, but it was found to have a large value for boom purposes. It had never been used for such purposes, but there was nothing to prevent other persons or companies from engaging in the enterprise if they had seen fit to do so. It was held that the value for boom purposes must govern. And the court, per Field, J. (who, when on the State bench had concurred in *Gilmer* v. *Lime Point*), said : ' In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such case must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted ?—that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and so varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule ; but as a general thing we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

" The same rule has been laid down in numerous other cases.

In *Harrison* v. *Young*, 9 Ga., 364, 365, a piece of land was sought to be condemned by a bridge company. The trial court refused to admit evidence as to the value of the land 'as a bridge site,' and restricted the evidence 'to the actual value of the land for its agricultural and productive qualities.' It was held that this was an error, the court, per Lumpkin, J., saying: 'Who, in making investments of capital in real estate, is not influenced by the consideration that it will be valuable for a town, bridge, ferry, mill, manufactory, etc.?' In *Louisville R. R. Co.* v. *Ryan*, 64 Miss., 399, the tract condemned was a narrow strip along the Mississippi River. Evidence was admitted to show that it was peculiarly valuable as a mill-site, although no mill was then upon it. Upon appeal, it was held that the evidence was properly admitted, the court saying: 'Clearly, it is of insignificant value for agricultural purposes, and there is neither a wharf, a factory, or a saw-mill on it, and there may never be. But if its adaptability for these purposes, or any one of them, gives it a present value, the owner is entitled to that value, though, in fact, no one now proposes to use it for any of these purposes.'

"In *Chicago R. R. Co.* v. *The Catholic Bishop*, 119 Ill., 530, the property sought to be condemned for railroad purposes was a strip in front of a cemetery. For many years it had been rented as a marble yard. Evidence was introduced that it had a special value for restaurant purposes. It was held that this value should be considered, although the Bishop would not rent it for such purposes, the court saying: 'Because the proprietor of the land elects to use it for one purpose rather than another, we do not think its capacity for the use to which it is not put is improperly taken into consideration in estimating its value.' In *South Park Commissioners* v. *Dunlevy*, 91 Ill., 49, two tracts were sought to be condemned for a public park, and it was held to be proper to prove what the property would be worth if sub-divided into lots and blocks. In *Sherman* v. *St. Paul R. R. Co.*, 30 Minn., 229, the land sought to be condemned for railroad purposes, 'though at the

time occupied as a farm, was situated in the vicinity of the City of St. Paul, and near certain public institutions.' And in view of this, it was held proper to prove its value for suburban residences. And so in other cases. (See *Chicago & E. R. R. Co.* v. *Jacobs*, 110 Ill., 416; *Haslam* v. *Galena R. R.*, 64 Ill., 353; *Little Rock J. R. R.* v. *Woodruff*, 49 Ark., 394; *Railway Co.* v. *McGehee*, 41 Ark., 207; *Amoskeag Co.* v. *Worcester*, 60 N. H., 526; *Low* v. *R. R. Co*, 63. N. H., 558; *Montana R. R.* v. *Warren*, 6 Mont., 275; *Goodlin* v. *Cincinnati Canal Co.*, 18 Ohio St., 181; *Chicago & N. W. R. R.* v. *C. & N. E. R. R.*, 112 Ill., 608; *Matter of N. Y. & L. R. R. Co.*, 27 Hun., 120; *St. Louis R. R.* v. *Chapman*, 38 Kan., 307.)

"We think, therefore, that it was proper to show the value of the property 'as a reservoir site.' This is not sanctioning a remote or speculative value. It is merely taking the present value for prospective purposes."

The policy of the Legislature of North Carolina when it originally enacted section 1946 absolutely prohibited commissioners appointed to assess damages from following the principles announced in *Boom Company* v. *Patterson*, *supra*, and from considering all of the elements there declared to be proper. But the whole policy of the legislature changed when it struck the following words from section 1946, viz:

"And in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad."

When this clause of section 1946 is striken out, what is the inevitable inference? Is it not that the elements declared by this court in the *Boom Case* to be proper (the elements excluded by section 1996 as originally enacted) take their natural place and effect as elements entering into the estimation and calculation of 'just compensation' to the land owner.

If this be a sound view of the law, and we submit that it is, then it seems clear that the railroad company cannot be paid less than what the privilege wanted by the telegraph company is worth to that company—*i. e.* less than the value of a right of way for telegraph purposes on the land of the railroad: that the railroad company cannot be paid less than the value of the benefit which may be estimated to accrue from the railroad company to the condemning telegraph company.

Note how radical is the revolution in policy. Says the law of '83,—when a railroad takes the property of the citizen for its purposes, and the question of just compensation arises, you shall neither reduce the damages by offsetting against them the benefits estimated to accrue to the defendant's property from the construction of the proposed railroad, nor shall you add to them the amount of the benefits estimated to accrue to the condemning company from the same cause. You shall not consider the value of the property with reference to its suitability for the purposes of the condemning corporation. You shall not consider the value of the property with reference to the most advantageous uses to which it may be applied.

But, in the law of '91, the General Assembly has completely changed its mind and its position, and determined that all these elements ought to be, and shall be, considered, and such is the law of North Carolina to-day, as regards compensation to the citizen when a railroad takes his property.

What is the law when a telegraph company condemns?

The learned Judge of the Circuit Court, while admitting that section 1946 had been radically amended and changed as to railroad condemnations, held that it remained in full force as to telegraph condemnations and, in his order of September 15, 1898, prohibited the commissioners from considering the value of the property (sought to be condemned) to the condemning telegraph company, *i. e.* prohibited the commissioners from considering the value of the property with reference

to its location and suitability as a right of way for telegraph purposes.

We respectfully submit that section 1946, as originally enacted, has been repealed and swept out of existence by the deliberate and determined act of the legislature of the State. Notwithstanding this fact, the condeming Telegraph Company takes refuge in the theory of *incorporation* and claims that section 1946 as originally enacted, though repealed and abolished as to railroad companies, still exists as to telegraph companies because of the reference to it in section 2012 of the Code.

We are aware of the existence of such a theory, but it is at best an unnatural theory and entirely without application to the case at bar. Most of the cases in which this theory has been applied will be found to have been characterized by one or more of the following features, to-wit:

(*a*) *The reference to the earlier law* in the referring and preserving statute, has usually been *distinct and elaborate, amounting, indeed, to incorporation and almost to formal re-enactment: e. g.*, in the case of *Regina* v. *Merionetshire*, 6 Ad. & El. N. S. 342 (51 E. C. L.), where it was held that the reference in a statute of 43 G., 3, to a statute of 13 G., 3, preserved the latter from the effect of a general repeal of it by a statute of 5 & 6 W., 4. The case was carried largely by force of the substantially re-enacting character of the reference to the earlier statute, which was in these words: "*as fully and effectually as if the same and every part thereof were herein repeated and re-enacted.*" Notwithstanding the remarkable character of this reference, all the learned judges hesitated, and one of them, Williams, J., on page 347, said:

"It certainly appears strange that, when an act of Parliament is *per se* abolished, it shall virtually have effect through another act. But any difficulty which that may raise is met by the manner in which the earlier act is introduced in Stat. 43, G. 3, c. 59, 'as if the same' 'were herein repeated and re-enacted.' To save the trouble of incorporating it in terms, they

do so by relation: but the provisions are made part of Stat. 43, G. 3, c. 59, 'as much as if they were expressly incorporated.'"

The difference, nay, the contrast, between the phraseology employed in section 2012 of the Code of North Carolina, and the phraseology employed in 43 G. 3, c. 59, is so palpable that further comment is unnecessary.

(*b*) The referring statute is generally a *private, special, or local law*, which, by incorporating some provision of a general law, makes it a part of itself, and thus preserves it, *as a private, special, and local law*, even after it has been repealed as a law of general application and operation. Numerous cases of this character might be cited, but manifestly they could have no application to the case at bar.

(*c*) The theory should never be applied, indeed, it may even be said that it cannot be applied, where both laws are *general in their nature, concern subjects cognate and closely related, and yet are distinctly and strongly contradictory of each other;* because—

(*d*) The matter is largely one of *legislative intent*, and it will not be presumed that the legislature deliberately intended to put or to keep in operation, at the same time, and substantially regulating the same subject, two conflicting and irreconcilable statutes; thus introducing an unreasonable, unjust, and destructive conflict and confusion, in place of that uniform, equitable and reliable system of law which alone can protect, foster, and develop the social and business life of the community.

We said above that section 2012 did not authorize or entitle the Telegraph Company to proceed under the railroad condemnation law as amended since 1883. Is it too much now to add, that it does not authorize or entitle that company to proceed under the provisions of the law of '83 itself, inasmuch as that law has been amended, and, in vital particulars, repealed by the Legislature? Can that body be construed as intending to authorize *a condemning railroad* to apply one measure of compensation and *a condemning telegraph company* a radically

nt one? If we are right in this view, and we hardly v we can be wrong, then we believe we are authorized ating the proposition with which we opened this branch argument, viz:

there is no law existing on the statute book of North na to-day, by which a telegraph company is author- condemn for its purposes the strip of land constitut- roadway of a railroad company.

Effect of Repeal.

above discussion will be rendered more complete, and e more completely satisfactory to the court, by a cita- a few of the many great cases and a few of the many es of great lawyers, jurists and judges, emphasizing tion that a statute repealed is in general to be regarded never had existed.

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14 Eng. L. & E., 127.

Subject: Effect of Repeal of Statute.

gina v. *The Inhabitants of Denton*, 14 Law & Equity, eridge, J., said: "What has been perfected is not to rbed, but if we require the act for any further step it in force at the time. This is expressed by Lord Ten- n *Surtees* v. *Ellison*. He says, 'It has long been estab- hat when an act of Parliament is repealed it must be ed, except as to transactions past and closed, as if it ad existed.' That is the correct rule of law on the and applied to the facts of this case as it was in *Sur- llison*, is quite conclusive here. *The King* v. *M'Kenzie*, R., 429, is to the same effect."

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15 W. Va., 224.

Subject: Effect of Repeal of Statute.

rran v. *Owens*, 15 W. Va., 224, the court, after an ex-

haustive review of English and American cases, said: "We think it well settled, that the general rule is that, when an act of the Legislature is repealed, it must be considered, except as to transactions *past and closed*, as if it never existed."

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46 Ala., 610.

Subject: Effect of Repeal of Statute.

In *Medical College of Alabama* v. *Muldon & Sons*, 46 Ala., 610, the court said: "When a statute is repealed, it must be considered, except as to those transactions which are past and closed, as if it never existed—*Dwarris on Stat.*, 676; *Butler* v. *Palmer*, 1 Hill, 324–328; 9 Wall., 506. Rights of action and other executory rights arising under a statute are said to be vested (*Beadleston* v. *Sprague*, 6 John's R., 101), but unless they amount to a contract, and the statute being simply repealed, *the very stock on which they were grafted is cut down*, and there is no rule of construction under which they can be saved. 1 Hill, 328."

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50 Miss., 681.

Subject: Effect of Repeal of Statute.

In *Musgrove, Auditor, &c.*, v. *V. & N. R. R. Co.*, 50 Miss. 681, the Supreme Court of Mississippi said: "The later authorities, discussing the effect of a repealing statute, generally refer to the terse and precise language of Tindall, C. J., in *Key* v. *Goodwin*, 4 Moore & Payne, 341: 'The effect of the repealing statute is to obliterate the repealed statute as completely from the records of Parliament as if it had never been passed. * * * It must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded* while it was an existing law.' Sustained, as this case is, by so great a weight of authority, we accept it as an accurate statement of the general rule. Some of the very numerous American cases are: *But-*

Palmer, 1 Hill (N. Y.) 324; *Harding* v. *People*, 22 N. Y., *Duane* v. *United States*, 5 Cranch, 281; *C. L. & L. R. R. Co. nton County*, 12 B. Monroe, 144."

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6 Cranch, 329.

Subject: Effect of Repeal of Statute.

The Schooner Rachel v. *The United States*, 6 Cranch, 329, ourt held as follows :

o sentence of condemnation can be affirmed *if the law* which the forfeiture accrued *has expired*, although a con- ation and sale had taken place, and the money had been over to the United States before the expiration of the law. court, reversing the sentence, will not order the money to paid, but will award *restitution* of the property, as if no ad been made."

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5 Wall., 544.

Subject: Effect of Repeal of Statute.

Insurance Company v. *Ritchie*, 5 Wall., 544, Chief-Justice said: "It is clear, that when the jurisdiction of a cause ds upon a statute *the repeal of the statute takes away the ction.* And it is equally clear, that where a jurisdiction, red by statute, is prohibited by a subsequent statute, the ition is, so far, a repeal of the statute conferring the ction.

it quite possible that *this effect* of the Act of 1866 *was ntemplated by Congress.* The jurisdiction given by the 1833 in cases arising under the customs revenue laws taken away or affected by it. In these cases suits may e maintained against collectors by citizens of the same. It is certainly difficult to perceive a reason for discrim- n between such suits and suits under the internal reve- w; but when terms are unambiguo we may not spec-

late on probabilities of intention. The rules of interpretation settled and established in the construction of statutes deny to us jurisdiction of the controversy in the record, because it is a suit between citizens of the same State, and the jurisdiction of such suits in internal revenue cases, conferred by the Acts of 1833 and 1864, is taken away by the Act of 1866."

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7 Wall., 515.

Subject: Effect of Repeal of Statute.

In *ex parte McCardle*, 7 Wall., 515, the court said:

"It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; *and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.*"

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8 Otto., 398 (98 U. S.)

Subject: Effect of Repeal of Statute.

In *Baltimore & Potomac Railroad Co.* v. *Grant*, 8 Otto., 398, the court held that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. In delivering the opinion of the court, Mr. Chief Justice Waite (p. 402), said:

"It is claimed, however, that, taking the whole of the Act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the Act which in express terms indicates any such intention. *Usually where a limited repeal only is intended, it is so expressly declared.* Thus, in the Act of 1875 (18 Stat. at L., 316), raising the jurisdictional amount in cases brought here for review from the Circuit Courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the Act of 1874 (Id. 27), reg-

appeals to this court from the supreme courts of itories, the phrase is, 'That this Act shall not apply now pending in the Supreme Court of the United here the record has already been filed.' *Indeed, so s it, when a limited repeal only is intended, to insert some that express effect in the repealing Act, that if nothing of s found, the presumption is always strong against continuing w in force for any purpose.* We think it will not be that an appeal may now be taken or a writ of error upon a decree or a judgment rendered before the Act ook effect, if the matter in dispute is not more than ut it seems to us there is just as much authority for up new cases under the old law as for hearing old here is nothing in the statute which indicates any in- make a difference between suits begun and those n. If, as is contended, the object of Congress was to jurisdictional amount because of the increase of the orce in the district, we see no good reason why those commenced their proceedings for review of old judg- ould be entitled to more consideration than those who No declaration of any such object on the part of is found in the law; and when, if it had been the in- confine the operation to what was done to judg- reafter rendered or cases not pending, *it would have y to have said so, we must presume that Congress meant ge employed should have its usual and ordinary significa- hat the old law should be unconditionally repealed.*"

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168 U. S., 103.

Subject: Failure to provide for Contingencies.

v. *Goldenberg*, 168 U. S., p. 102–3, Mr. Justice Brewer, for the court, said:

rimary and general rule of statutory construction is that f the lawmaker is to be found in the language that he has is presumed to know the meaning of words and the rules

of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent, *No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.* In the case at bar *the omission* to make specific provision for the time of payment *does not offend the moral sense; Holy Trinity Church* v. *United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby*, 7 Wall., 482; *McKee* v. *United States*, 164 U. S., 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. * * * *Certainly, there is nothing which imperatively requires the court to supply an ommission in the statute, or to hold that Congress must have intended to do that which it has failed to do.*"

In the light of these authorities and the fundamental principles they invoke and impress, we submit that, when the legislature of North Carolina, by the Act of February 25, 1891, struck out a certain clause of section 1946 of the Code of 1883, and *did not accompany or modify this repeal by any limiting or saving clause*, it thereby obliterated and utterly did away, for any and all purposes, with the old measure of compensation to which the land owner had been theretofore entitled when his property was taken from him for public use. In this connection the court will permit us to call special attention to the pregnant utterance of the court upon this precise point, in a case from which a fuller quotation is above made, to-wit: *Balt. & Pot. R. R. Co.* v. *Grant*, 98 U. S., 402.

"Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing Act, that if nothing of the kind is found, the pre-

sumption is always strong against continuing the old law in force for any purpose."

It is manifest how every canon of construction and every consideration of convenience and of common-sense involved in the position above contended for, is heightened and reinforced, in the case at bar, by the fact that both statutes concerned, the old and the new, are general in their nature—not special or local—that both refer to the same general subject matter, and that both regulate the right of eminent domain; so that, to hold otherwise than that the old law has been entirely repealed by the new, must necessarily result in confusion, inequality, and injustice in the administration of one of the most important laws upon the statute book, and in the exercise of the gravest, the most imperial and the most oppressive of all the powers of the modern State.

Position of the Trial Court.

Having thus stated fully our position as to the effect of this repeal, and the principles and authorities upon which it is based, let us somewhat analyze the position of the trial court upon this point. His Honor, the circuit judge who tried the case, held (see his opinion, record, pp. 26 to 33) that the statutory amendments above quoted and discussed *had no effect whatever upon the law regulating condemnation proceedings by telegraph companies*; that, in spite of these amendents, the law of eminent domain applicable to telegraph companies in North Carolina remained just what it was before their passage, being still governed by the sections of the Code of 1883, as they stood prior to amendment.

Observe (1) that section 1946 (p. 8, *supra*) was, by section 2012 (p. 15, *supra*), made applicable to condemnation proceedings by telegraph companies, and (2) that the feature which this section assumes to regulate is the most important and vital point in the entire scope and operation of the law, to-wit: the principle upon which and the rule by which "just compensa-

tion" to the land owner is to be arrived at, when his property is to be taken from him for public use.

Be it further noted that it is distinctly held by the trial court, that this section 1946, as amended, has no application to telegraph companies; so that the sole question remaining to be considered is this:

It being conceded that section 1946, as it stood in the Code of 1883, prior to the passage of the act of February 25, 1891, was thereby repealed, and is no longer in existence as applicable to condemnation proceedings by *railroad* companies—is this old Code section 1946 still in existence and in force as applicable to *telegraph* companies?

His honor rules that it is, and gives as his reason therefor the maxim—"*ut res valeat non pereat*"—which seems to us totally inapplicable as a guiding principle in the construction of a statute of Eminent Domain, where the question is the fundamental one—*whether or not the right exists.* As we understand the law, where this is the question, the court will infer or imply nothing in favor of the right, or of the statute which is claimed to confer it. So far from making any forced construction in favor of the validity of such statute, the correct canon of construction requires that every doubtful point shall be resolved against it. In such a case, upon such a question, in construing such a statute, as has been well said, "to be in doubt is to be resolved," and resolved *against* the validity of the statute and the existence of the right. And yet, so far does his honor, the circuit judge, go, in insisting upon the prevalence of his guiding rule of construction, as he says, "of all written documents," to-wit: "*ut res valeat*"—that, although, as we have just shown, a certain clause of section 1946 has been absolutely repealed by the Legislature, without any saving or limiting clause in the repealing statute, the court, by a single stroke of legislative power, again re-enacts this clause—holding that compensation may be regulated, where telegraph companies condemn, by "adopting *in ipsissimis verbis* the lan-

guage of section 1946, and reading section 2012, as if the words were again repeated." See opinion of the court, record, page 32.

But, his honor goes much further, as we understand his opinion, even suggesting that the court may, if necessary, legislate into existence *a new rule* for estimating compensation (record, p. 32), to the landowner, if it be considered that the words stricken from section 1946, by the Act of February, 1891, have been absolutely and for all purposes repealed. His language is this:

"Or it may be held that the commissioners could assess the damages, as if the qualifying words were out, that is to say, following the instructions of the section immediately preceding the words afterwards stricken out, 'ascertain and determine the compensation which ought justly to be made by the telegraph company to the railroad company.' And, if necessary the court in this respect could direct and instruct them as to a just method." Record, p. 32.

We ask this court to read carefully the language of the opinion of the learned Circuit Judge, and see if we have done him injustice.

A subsequent opinion filed in the cause October 17, 1898, see record pp. 56–58, exhibits the same attitude of the court towards the statute, the same judicial inclination to solve all points of doubt in favor of the validity of the act, which is, if possible, to be sustained. His honor says, record, p. 57:

"The position taken by the defendant is very nice and ingenious. It does not create conviction of its soundness. Yet it is most difficult to answer."

And the closing paragraph of this opinion, p. 58, exhibits yet more impressively the influence upon the judicial mind, of the same guiding rule of construction—"*ut res valeat.*" In the discussion of certain objections of the defendant to the jurisdiction of the Court, the learned Circuit Judge, as a final and conclusive ground for overruling the objections and sustaining the jurisdiction, says:

"If this plaintiff be compelled to go into every county through which the railway company has built its way, and there seek the relief it seeks here, its interest will be put into the hands of very many boards of commissioners, whose conclusions would be naturally conflicting, perhaps contradictory. The enterprise of a telegraph company, now one of the necessities of the commercial world, will be delayed, hampered, perhaps defeated."

This consideration of consequences—the argument *ab inconvenienti*—is thus made conclusive against what is conceded to be the *prima facie* construction of the statute of North Carolina, and this too, notwithstanding the fact that it cannot be denied that the Eminent Domain statute of Virginia plainly requires this very piecemeal jurisdiction of separate county courts, in the condemnation of the strip of land constituting the roadway of a railroad, if indeed such land be subject to condemnation at all.

But again, his honor leaves entirely out of view one of the most important features of the clause which was stricken from Section 1946 (p. 8, *supra*) to-wit: that portion of the clause which relates to the calculation of *benefits to the parties*. He gives reasons, satisfactory to himself, why no possible benefit or advantage could accrue to *the defendant*, from the erection of the telegraph line, and therefore assumes that the feature of Section 1946, as to the "benefits" accruing, falls out of the calculation altogether. In his opinion, record, p. 32, the learned circuit judge says:

"In the present case, looking at it as a practical matter, no difficulty could arise. The Railroad Company deny altogether that any benefit or advantage can arise to it in the erection of the telegraph lines, and on the contrary aver that it is detrimental to it in the last degree. The commissioners would have before them no question of benefits, but one altogether as to damages."

His honor evidently overlooked the principles announced in *Boom Company* v. *Patterson*, *supra*, and that established line of cases, as well as the fact that the clause (p. 13 *supra*) which was stricken from section 1946 of the Code by the act of 1891, speaks both of "allowance" and "deduction" of "benefits"

accruing to "*the parties*"; *i. e.*, of course, to both parties. We do not see how it is possible for the clause in question to be otherwise construed, and if we are correct in this position, the opinion of the court is incorrect, in inferring that, "in the present case, looking at it as a practical matter, no difficulty can arise."

The point just made is merely another indication that the construction of the statute by the trial court was not sound, and ought to be reviewed and reversed by this honorable court.

As heretofore stated, it will be seen from the opinion of the Circuit Court record, pp. 26–33, and the orders of September 15, 1898, and October 24, 1898, copied at pp. 16, 17 of this brief, that the learned Circuit Judge substantially ruled that condemnation proceedings by railroad companies are governed by the amendment of February 25, 1891, while condemnation proceedings by telegraph companies are governed by section 1946, as it stood in the Code of 1883, prior to amendment.

In the light of this ruling let us see what the practical result would be, in a given case, of the successive operation of the two Eminent Domain statutes, both of which are thus construed by the trial court to be in existence and operative today.

Let us suppose, for example, that a railroad company in North Carolina, having first condemned the property of a citizen for its purposes, is about to have the same property—now become the property of the railroad—condemned by a telegraph company for its purposes. Let us further suppose that the value of the property of the land owner in each condemnation, having reference to the uses to which the property was then applied and having no reference to the uses to which it was plainly suitable, amounted to, say, $1,000, and that the value of the property for other uses to which it was naturally suitable and for which it was wanted by the condemning company, to-wit: the railroad company in the first condemna-

tion and the telegraph company in the second, amounted to, say, $10,000. Is it not clear that, in the first condemnation, governed by the law of 1891, the railroad company would be required to pay the citizen, whose property it took, the sum of ten thousand dollars ($10,000); while in the second condemnation governed by Code section 1946, the telegraph company would only be required to pay the railroad company the sum of one thousand dollars ($1,000)? Will it be contended that such a result represents and embodies "the equal protection of the laws"

The order of September 15, 1898, (p. 16 *supra*) prohibits the commissioners from considering the benefit to be derived by the telegraph company or the value of the condemned property to it: that is to say, this order shuts out light with reference to the suitability of the property for the purposes for which it is wanted; it shuts out the inquiry—"What is the value of the property for the most advantageous uses to which it may be applied?" 98 U. S., 410:—the language of the order in this point being as follows:

"The said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside, and they are authorized and empowered to take such testimony in respect to the said damages to the said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived by the Telegraph Co. or the value thereof, to it;" see record, p. 36.

The Eminent Domain Legislation of North Carolina, in relation to the Fourteenth Amendment to the Constitution of the United States.

We have thus far discussed the question as to what the eminent domain legislation of North Carolina really is to-day, and this discussion has proceeded largely upon the basis of what

ight be considered to be the intention of the Legislature in
e premises. In other words—whether or not section 1946, of
e Code of North Carolina of 1883, is to be regarded as in
xistence and in force, under a proper construction of the
mendatory and repealing statute, adopted the 25th of Feb-
ary, 1891; whether or not the reasonable construction of
id section and said amendatory and repealing statute, will re-
lt in both the statutes remaining upon the statute book and
force to-day, the one applicable to railroad companies, and
e other applicable to telegraph companies.

We now lay down another and totally distinct proposition,
-wit: that, whatever may have been the intention of the leg-
lature of North Carolina in the premises, and whatever its
gislation upon this subject, under the soundest and truest
nstruction, may be held to be to-day, yet, *that legislation would
cessarily be invalid, under the Fourteenth Amendment to the Con-
itution of the United States, if it really is what it was construed
be by the learned judge of the Circuit Court.* In other words, the
ecision of that court, substantially holding that proceedings
a telegraph company, to condemn a right of way for its
rposes in the State of North Carolina, are governed by and
be conducted in accordance with section 1946 of the Code
1883,—and that proceedings by a railroad company, to con-
mn a right of way for its purposes in said State, are gov-
ned by and to be conducted in accordance with said statute
amended by the Act of February 25, 1891,—the two statutes
idely differing in the rule and measure of compensation
hich they apply—is in violation of section 1, Article XIV of
Amendments to the Constitution of the United States," which
ovides as follows:

**"Nor shall any State deprive any person of life, liberty
property without due process of law; nor deny to any
rson within its jurisdiction the equal protection of the
ws."**

The application and the conclusive effect upon the question

under discussion, of the provisions above quoted, can be questioned, as it seems to us, only upon one of *three grounds*, which we will consider seriatim: but we prefer to conduct the discussion and to state our position under three positive, rather than three interrogatory or negative, propositions; and

FIRST.

A corporation is a "person" within the meaning and purview of the Fourteenth Amendment to the Constitution of the United States.

165, U. S., 150.

Subject: Corporation a person under XIV Amendment.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, Mr. Justice Brewer, in delivering the opinion of the court (pp. 154–56), said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S., 394; *Pembina Mining Co.*, v. *Pennsylvania*, 125 U. S., 181, 189; *Missouri Pacific Railway* v. *Mackey*, 127 U. S., 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S., 210; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S., 26; *Charlotte & Columbia Railroad* v. *Gibbes*, 142 U. S., 386; *Covington & Lexington Turnpike Company* v. *Sanford*, 164 U. S., 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

SECOND.

The defendant corporation is to-day, and was at the date of the beginning of this proceeding, a "person *within its jurisdiction*," and therefore entitled, under the 14th Amendment to the

onstitution of the United States, to claim "the equal pro-ction of the laws" of the State of North Carolina.

It is scarcely worth while to support this proposition by au-ority, it being sufficient to say that it has been held by this urt that the words "within its jurisdiction" are not without eaning and influence upon the proper construction of the ction of the Fourteenth Amendment under discussion, *i. e.*, e position of the court is that—whatever may be said as to due process of law," a person to be entitled to "the equal otection of the laws," must be *within the jurisdiction of the ate*, whose laws are questioned in this regard. It is clear, wever, that a corporation owning property and doing busi-ss within the confines of a State—in other words, a corpora-n in such relation to a State as is and was the appellant ilway Company with regard to the State of North Carolina cannot be denied to be, within the meaning of the first sec-n of the Fourteenth Amendment, "*within the jurisdiction*" of ch State.

THIRD.

The third proposition which we intended to lay down, natu-ly divides itself into two, and this because of the fact that are here really invoking for the defendant company, *i. e.*, the aintiff in error, the protection of two distinct and independent ovisions of the Fourteenth Amendment to the Constitution the United States, to-wit: the provision which entitles every rson to "due process of law," and the provision which en-les every person to "the equal protection of the laws." king the last provision first, we now declare:

The eminent domain legislation of North Carolina, as con-ued by the honorable Circuit Court in the decisions and lers brought before this court for review, denied to the de-dant Railway Company "the equal protection of the laws" that State.

165 U. S., 154.

Subject: Equal Protection of the Laws.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 154–156, Mr. Justice Brewer said: "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, *Hayes* v. *Missouri*, 120 U. S., 68; *Railroad Company* v. *Mackey*, 127 U. S., 205; *Walston* v. *Nevin*, 128 U. S., 578; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232; *Pacific Express Co.* v. *Seibert*, 142 U. S., 339; *Giozza* v. *Tiernan*, 148 U. S., 657; *Columbia Southern Railway* v. *Wright*, 151 U. S., 470; *Marchant* v. *Pennsylvania Railroad*, 153 U. S., 380; *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S., 1; yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

"As well said by Black, J., in *State* v. *Loomis*, 115 Missouri 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder, at the store or other place of business of the corporation, was held

gislation and void: 'Classification for legislative pur-
nust have some reasonable basis upon which to stand.
t be evident that differences which would serve for a
ation for some purposes furnish no reason whatever
lassification for legislative purposes. The differences
will support class legislation must be such as in the
of thing furnish a reasonable basis for separate laws
gulations. Thus the legislature may fix the age at
persons shall be deemed competent to contract for
lves, but no one will claim that competency to contract
made to depend upon stature or color of the hair. Such
fication for such a purpose would be arbitrary and a
legislative despotism, and therefore not the law of the

Vanzant v. *Waddel*, 2 Yerger, 260, 270, Catron, J., (after-
Ir. Justice Catron of this Court,) speaking for the Su-
Court of Tennessee, declared: 'every partial or private
ich directly proposes to destroy or affect individual
or does the same thing by affording remedies leading
ar consequences, is unconstitutional and void. Were
erwise, odious individuals and corporate bodies would
rned by one rule, and the mass of the community, who
e law, by another.'

Dibrell v. *Morris' Heirs*, Supreme Court of Tennesse, 15
Lep., 87, 95, Baxter, special judge, reviewing at some
cases of classification, closes the review with these
'We conclude, upon a review of the cases referred to
hat, whether a statute be public or private, general or
in form, if it attempts to create distinctions and classi-
between the citizens of this State, the basis of such
ation must be natural and not arbitrary.'

Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, the
was presented as to the power of the State to classify
oses of taxation, and while it was conceded that a large
n in these respects was vested in the various legisla-
e fact of a limit to such discretion was recognized, the
y Mr. Justice Bradley, saying, on page 237: 'All such

egulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition!'"

148 U. S., 312.

Subject: Eminent Domain: Equal protection under XIV Amendment.

In the case of *Monongahela Navigation Company* v. *United States*, 148 U. S., 312, Mr. Justice Brewer, after citing, on page 324, *Simmickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, and considering that part of the Fifth Amendment to the Constitution of the United States which prohibits the Federal Government from taking private property without compensation, at p. 327, said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 571, Mr. Justice McLean, in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country

d constitutionally do: assess the amount of compen-
which the complainants are entitled.' See also the
authorities: *Commonwealth* v. *Pittsburg & Connells-*
oad, 58 Penn. St., 26, 50; *Penn Railroad* v. *Balt. &*
road, 60 Maryland, 263; *Isom* v. *Mississippi Central*
36 Mississippi, 300.

e last of these cases, and on page 315, will be found
ervations of the court: 'The right of the legislature
te, by law, to apply the property of the citizen to the
, and then to constitute itself the judge in its own
etermine what is the 'just compensation' it ought to
for, or how much benefit it has conferred upon the
thus taking his property without his consent, or to
any part of such 'compensation' by prospective
l advantage, or *in any manner* to interfere with the
rs and province of courts and juries in administering
justice, cannot for a moment be admitted or tolerated
constitution. If anything can be clear and unde-
on principles of natural justice or constitutional law,
hat this must be so.'

re not, therefore, concluded by the declaration in the
e franchise to collect tolls is not to be considered in
the sum to be paid for the property."

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rned Circuit Judge seems to have overlooked these
and the feature of the statute and of the statutory
roduced by the amendment of 1891, upon which we
mented, and the unequal operation of the statutes
have discussed.

submit, inconceivable that valuations so radically
in condemnations by telegraph companies as con-
h condemnations by railroad companies in circum-
substantially similar, should represent the "equal
of the laws," guaranteed by the Fourteenth Amend-
e Constitution of the United States, or embody that
pensation" guaranteed to the citizen when his pro-

perty is taken by the exercise of the sovereign power of Eminent Domain.

Due Process of Law.

The Eminent Domain legislation of North Carolina, as construed and administered in the case at bar, under the decisions and orders of the trial court brought here for review, deprived the defendant of that "due process of law," to which he was and is entitled, for the protection of his property, under the Fourteenth Amendment to the Federal Constitution.

It is unnecessary to enter upon an extended discussion of this point. The discussion contained in a later part of this brief, with regard to the "Mode of Procedure" as fixed in the orders of the Circuit Court, bears directly upon the proposition just laid down. If the statute of North Carolina, properly construed, authorizes and allows that all the important *judicial* acts, which are required to be performed in the course of a proceeding for the condemnation of property, should be performed by the clerk of this court,—then it is manifest that this statute authorizes the taking of the property of the citizen without "due process of law."

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169 U. S., 390.

Subject: Due process of law under XIV Amendment.

In *Holden* v. *Hardy*, 169 U. S., 366, Mr. Justice Brown in delivering the opinion of the court, at p. 390, said:

". . . Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defence."

CHARACTER OF PROPOSED CONDEMNATION.

The Circuit Court by its orders of Sept. 15, 1898 and Oct. 24, 1898:

3. Determined that the condemned right of way for telegraph purposes may be unfixed, shifting and changing as to location. (P. 19 *supra*).

We call attention to the character of the proposed condemnation. The plaintiff telegraph company proposes to condemn an unfixed, changing right of way. It proposes to so condemn the telegraphic right of way, that it may be shifted and changed from time to time. It is impossible to know or to determine where the rights of the telegraph company begin, and where they end; to designate any particular spot upon the land of the railroad where the line of the telegraph company is to be located, and when located to remain. It may be on one side of the track this month, on the other side next month, and in yet another place a few months later. In short, the inevitable inferences is, if this mongrel condemnation is to be allowed—that the telegraph company shall be held to have condemned the entire roadway of the railroad for its purposes —and yet this is not what is ostensibly prayed in the telegraph company's petition.

On the contrary, the condemnation proposed by the telegraph company appears to be part condemnation and part *enforced agreement*. It takes the whole sovereign power of a State to condemn the property of a citizen under the law of North Carolina, but under the petition of the telegraph company, in the case at bar, it can condemn a right of way and afterwards swap that right of way for another and different right of way. It may be likened to the condemnation of an acre-lot in a field, accompanied with a proposition to the defendant that, if he wants that particular acre, the condemning corporation will at any time hereafter swap it for another acre in a different part of the field. In view of the rules governing condemnation, this strikes the mind as a remarkable proposition.

By reference to the petitions filed June 22, 1898, by the telegraph company, it will be seen that the right of way for telegraph purposes sought to be condemned upon the land of the Railway Company is unfixed, and shifting; that the petition contains no definite description of its location; that no map or survey accompanied the petition; and that the petition contains no statement that a map or survey has been made or filed anywhere, or served on the Railway Company.

The requirement of section 1944, of the Code of North Carolina, (pp. 6–7, *supra*,) that a corporation seeking to condemn shall state in a petition duly verified, "*that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed;*" seems to require that a telegraph company seeking to condemn a right of way upon the property of a railway company, shall state clearly and accurately the metes, bounds and width of the right of way wanted by the telegraph company for its purposes. This provision of section 1944 seems to prohibit the condemnation of an unfixed, shifting and changing right of way for telegraph purposes.

The public policy of the General Assembly at the time of the enactment of the Code of North Carolina, required a corporation seeking to exercise the sovereign right of Eminent Domain, to declare with clearness and precision exactly what it sought to take from the land-owner against his will and in derogation of common right, and by a map to show just where the right of way wanted for telegraph purposes is to be located on the land sought to be condemned. This will be clearly seen by a perusal of sections 1944 and 1952, copied in full at pp, 6–7, and pp. 10–11, of this brief.

106 N. C. 16.

In *Railroad* v. *Railroad*, 106 N. C., p. 16., the second paragraph of the syllabus is as follows:

"2. The petitioner in a proceeding to condemn land must allege that it has 'surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that it has located its said road according to such survey, and filed certificates of such localities, signed by a majority of its directors, in the Clerk's office,' &c., as required by the Code, Section 1952; otherwise, the proceeding will be dismissed."

And at p. 23 the Supreme Court of North Carolina said:

"This introduces us to the other ground assigned by the defendant, that the petitioner does not allege that it has 'surveyed the line or route of its proposed road, made a map or survey thereof by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such localities, signed by a majority of the directors of the company, in the Clerk's office, and given notice,' &c. The Code Section 1952.

"These conditions must be complied with before any company can construct any part of its road, and the Code Section 1944 requires that their performance shall be alleged in the petition in all proceedings to condemn land." * *

* * * * * * * *

And on page 25 the court further said:

"The foregoing references are made for the purpose of showing the true spirit and purpose of these laws, and that the performance of the preliminaries required is indispensably necessary before proceedings to condemn can be instituted. It is said that, although the petition in this case fails to allege the performance of these conditions, the omission is not fatal, that it is but a defective statement of a good cause of action. We do not concur in this view. The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such powers must be strictly construed. By the very terms of the law under consideration, these allegations must be

made in the petition, and we think that they are as much jurisdictional in their character as is the fact that the land owner and the Railroad Company have failed to agree. 'If the petition does not state the facts required by the statute to be stated an objection in that regard can be raised preliminarily in effect by way of demurrer, and should be disposed of before proceeding upon the merits. If such objection is well taken, the proceeding is dismissed, unless proper cause for amendment is shown.' West Shore & Buffalo Railroad Co., 64 How. Prac. 216; Fieri Special Pro, 523. So far from any amendment being suggested in the particulars mentioned the counsel were candid enough to admit that maps of the route, &c., had not in fact been filed."

It seems clear, in the light of this decision, that appellee's entire proceeding to condemn should be dismissed with costs.

The public policy of North Carolina has at least not been weakened in this particular since 1883, as may be seen by Acts of 1893, page 392 (pp. 12–13 *supra*), where it is required of a railroad seeking to condemn land for its purposes, "that, *at the time that the summons for such condemnation is served*, there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the heights of the embankments on the land so sought to be condemned, and at what points on such lands such cuts and embankments are located."

The petition of the Telegraph Company is in the very teeth of the public policy of the State of North Carolinia, outlined in the above enactments. The public policy of North Carolina requires clearness, accuracy and certainty—metes, bounds and locations, where a corporation seeks to exercise the sovereign right of Eminent Domain. The proceeding of the Telegraph Company in this case violates both the letter and the spirit, the purpose and the intent of the statutes enacted for the protection of the property owner. No map was served upon the Rail-

ad Company with the petition of the Telegraph Company; survey of its proposed route has been made by the Telegraph Company; no map by which such route is designated s been made; no location of such route has been made; no rtificates of location have been signed by a majority of the rectors of the Telegraph Company and filed in the clerk's fice of the counties through which it is proposed to extend ch route. In a word, the right of way for telegraph purses sought to be condemned by the Telegraph Company on the land of the Railroad Company is an indefinite, uncerin, changing, right of way, never at any time contemplated the General Assembly, and the proceeding wholly violates at clearness, accuracy, and certainty as to metes, bounds, cation, uses and the like, contemplated in chapter 49, of the de of North Carolina.

The public policy of the State, in requiring surveys, maps, rving of map with summons, designation of proposed route, cation according to survey, filing of certificates of location gned by a majority of the directors of the company in the erk's office, and the like, applies with infinitely greater, ined, with overwhelming force, to a case in which an attempt made to condemn a right of way for telegraph purposes up- the narrow and valuable strip of land of a railroad; upon artery of commerce; upon land used as a means of comunication between one part of the country and another; on a narrow strip of land along and upon which great numrs of passengers are daily and hourly transported at a emendous and ever-increasing rate of speed, and as to whose fety the law requires the railroad company to exercise every ssible degree of care and diligence, both as to its trains and rs, and as to the structure, repair, and care of its track, and other arrangements necessary to the safety of passengers.

Public policy and public safety alike require that a railroad mpany shall exercise all possible care and diligence for the otection of the lives of its passengers.

A map or survey showing the proposed route and designating e location of the telegraph line, would give the Railroad

Company an opportunity to show that the right of way wanted by the Telegraph Company for its purposes, would be inconsistent with the efficient management of the railroad; that the lives, limbs and safety of its passengers would be endangered by the presence of this hostile telegraph line, *with a right of way upon its* strip of land; and that the concurrent occupancy of its property, as proposed by the Telegraph Company, *would obstruct the ordinary use of the railroad.*

The right of way for erecting, repairing and preserving the poles, wires, and other structures necessary for operating a telegraph line, necessarily requires the possession of and control over a definite space of ground.

This space must be sufficiently broad to enable the telegraph company to transport poles and other materials by wagons, or suitable vehicles, along and upon the right of way so condemned, and to permit gangs of hands to erect new poles and other structures, to repair and replace defective, decayed, leaning or fallen poles and generally to keep the line in good condition."

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25 Vermont, 150.

Subject: Railroad's Exclusive Occupancy of its Right of Way.

In the case of *Jackson* v. *Rutland & B. R. Co.*, 25 Vermont, 150 Redfield, Ch. J., in delivering the unanimous opinion of the court, p. 159, says: * * "The railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the *exclusive occupancy of the land taken, and to exclude all concurrent occupancy*, by the former owners, in any mode and for any purpose. Any other view of the subject must lead to the imminent peril of life and property, and ultimately to the most glaring absurdities." * *

NO RIGHT TO CONDEMN IN ONE PROCEEDING.

The Circuit Court by its orders of September 15, 1898, and October 24, 1898:

4. Determined that the entire condemnation may be ad in one proceeding upon a strip of land, much of hich is held in fee simple (by the Railway Company) elonging to a single owner, and extending through twelve ifferent counties, a distance of nearly two hundred and fty miles.

The Telegraph Company seeks in one proceeding, instituted the Superior Court of Guilford county, to condemn, for its rposes as a telegraph company, a continuous right of way ong, upon and over the lands of the Southern Railway Comany, from a point on the State line between the States of orth Carolina and Virginia, where the Southern Railway osses the State line; thence south through the counties of ockingham, Guilford, Randolph, Davidson, Rowan, Cabarras, nd Mecklenburg to the town of Charlotte, in the last-named unty, and from the town of Greensboro, in the county of uilford, to the city of Raleigh, passing through the counties Guilford, Alamance, Orange, Durham, and Wake, and from reensboro to Winston in Forsyth county, a distance of early two hundred and fifty miles. This mode of procedure probably based upon a misconception of section 2010 of e Code of North Carolina, the full text of which has been ven at pp. 14-15, of this brief.

What is required by this section, where an effort is made condemn a right of way for telegraph purposes on land eld in fee simple.

SECTION 2010 ABSTRACTED AND APPLIED TO LANDS HELD IN FEE SIMPLE.

" Whenever such telegraph company shall fail, on application there-r, to secure by contract or agreement such right of way for the pur-ses aforesaid over the lands, * * of another person or corporation, shall be lawful for such telegraph company, first giving security for sts, to file its petition before the superior court for the county in which id lands are situate, * * setting forth and describing the parcels land, * * over which the way, privilege or right of use is claimed,

the owners of the land, * * and their place of residence, if known, and if not known, that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, * * Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings. * * * "

We respectfully submit that section 2010 thus analyzed and extracted fully answers the question propounded. It seems to be plain that proceedings to condemn a right of way for telegraph purposes on lands held in fee simple by a "person or corporation," must be in each particular county where the land, upon which the telegraphic right of way is wanted—is situated. Stated in other words; if the telegraph company has a right to condemn a right of way for telegraph purposes on lands held in fee simple by the Southern Railway Company, situate in Randolph county, the proceeding to condemn must be instituted and conducted in the Superior Court of Randolph county. It cannot be instituted and conducted in the Superior Court of Guilford county. This statute confers no power upon the Superior Court of one county to condemn a right of way for telegraph purposes on lands held in fee simple by a person or corporation situated in another and different county. No other statute of North Carolina confers jurisdiction upon the Superior Court of Guilford county to condemn a right of way for telegraph purposes, upon lands held in fee simple by a person or corporation which are situated in a county other than Guilford.

A large part of the land of the Railway Company, over and upon which the Telegraph Company seeks to condemn a right of way for its purposes, is held by the Railway Company in fee simple. These lands were acquired by purchase from the original owners, under deeds conveying to the Railway Company the fee simple title to the lands. The title of the Railway Company to such lands is as complete and absolute as the title of any citizen who has purchased property and taken a deed conveying to him a title in fee simple.

erified answer of the Railway Company, record p. 48, h 3, states, "that a large portion of the lands of this t along and upon which the petitioning Telegraph y seeks to condemn the right of way for its purposes in us counties specified in its said petition, is held by ndant in fee simple—the said land having been ac- y purchase from the original owners under deeds con- this defendant fee simple title to the same, a title as and absolute as that of any citizen who has purchased taken a deed for the same in fee simple." This an- met by demurrer, not denial. It has never been de- on this basis, on this point, the Circuit Court entered of September 15, 1898, and October 24, 1898.

2010 does not provide one mode of condemnation raph purposes when land is held in fee simple by a " and a different mode when land is held in fee a "corporation" The person stands on the same ith the corporation. The statute in this regard ap- e to the Railway Company and the citizen.

thority, under section 2010, to condemn in one pro- hrough more counties than one is *absolutely confined* where a telegraph company seeks to condemn a right r its purposes "over or upon an *easement or right of* h extends into or through more counties than one."

ord "land" is repeatedly used in Section 2010. The be said of the words "easement, or privilege," and "right of way." Technical words or terms are em- They are used in a statute presumably sketched by selected for their general and technical knowledge of sprudence, and adopted by the Legislature presumably mination by a special committee composed of the lead- rs in that body, and upon full consideration by revis- mittee, and the legislative body. When technical terms are used by a legislative body, the courts will the statute containing such words or terms, according echnical meaning. "The primary and general rule

of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." 168 U. S., 102.

Section 2010 contains no warrant for condemning the lands of a railroad company held by fee simple titles and extending through many counties in one proceeding. No proceeding like the one at bar can be taken, except where a telegraph company seeks to condemn a right of way "over or upon an easement or right of way which extends into or through more counties than one." The words "easement or right of way" do not embrace or include lands held by a fee simple title.

If the Legislature had intended that a right of way for telegraph purposes might be condemned in one proceeding upon land held in fee simple extending through many counties as well as upon a privilege or easement or right of way over land extending through more counties than one, it would have said so. It did not provide for such jurisdiction in a single county where a right of way is sought to be condemned upon land, extending through several counties, held under deeds conveying fee simple titles; and we respectfully submit that it would violate legal principles to so hold.

In the light of these authorities and the rule and principle to be deduced from them, it would seem clear that section 2010 of the Code of North Carolina does not authorize the condemnation by a telegraph company, of a telegraphic right of way over the property of a railway company extending into or through several counties—in one proceeding, to be brought in the superior court of any one of such counties—unless where the property, over which such telegraphic right of way is proposed to be condemned, is itself *a right of way only* as contradistinguished from land held by a fee simple title. It will be observed that the section clearly contemplates two distinct cases of condemnation by a telegraph company, and that the distinction between these two cases does not lie in the

ter of the right, title, or interest, which the petitioning
ph company is to obtain by the proceeding. No—that
ays and in every instance a *mere* right of way. Nor does
tion recognize any distinction or authorize any different
of procedure in condemning the property of private in-
als and of corporations; but it does recognize such dis-
n, between cases where a telegraph company proposes
demn for its purposes a right of way over lands held in
ple, and cases where it proposes to condemn for itself
ght of way over a mere easement or right of way, and
authorize different forums and different modes of pro-
in these two different classes of cases. Under the au-
s cited and the rule of construction therein laid down,
mit that it is not permissible to enter the forum or to
he procedure in one class of cases, which the statute
applicable in another class.

TION OF CIRCUIT COURT ON DEMURRER.
REFUSAL TO HEAR TESTIMONY.
CONDITIONS PRECEDENT.

Circuit Court by its orders of Sept. 15, 1898, and Oct.
8:

etermined upon demurrer that every defense set up
answer of the railway company is without merit,
hough it were proved by conclusive evidence.

efused to hear proof as required by section 1945 of the
f North Carolina.

etermined without proof conditions precedent to con-
tion under the North Carolina statutes.

event can a telegraphic right of way be condemned on
ad unless it be shown that the proposed telegraph line
so constructed "as not to obstruct or hinder the usual
n such railroad," &c., s. 2007. The condemning cor-
must file its petition. The railroad upon which the

ght of way is sought to be condemned then files its answer. he issue is thus made up. This section requires the court to ear the proofs, and if no sufficient cause be shown against e condemnation, to appoint commissioners. Observe, how- rer, that the court itself must hear the proofs upon which sue is joined *before* the appointment of commissioners. The ourt itself must determine that the right to condemn *exists.* he court itself must determine that the proposed telegraph ne will not obstruct ordinary travel nor hinder the usual avel on such railroad. In order to know whether or not the ne will do this, the court must know the character and loca- on of the line. These questions are, therefore, *jurisdictional.*

The sections of the Code of North Carolina specially bearing pon this point are as follows:

Sec. 2007. Telegraph lines, who may maintain. 1874-'5, . 203, s. 2.

Any telegraph company chartered or incorporated by this r any other state shall have the right to construct, maintain nd operate lines of telegraph along any railroad or other ublic highway in the State of North Carolina, but such lines f telegraph shall be so constructed and maintained as not to bstruct or hinder th usual travel on such railroad or other ighway.

Sec. 2009. Entitled to right of way upon just compensation. 874-'5, c. 203, s. 4.

Such telegraph company shall be entitled to the right of way ver the lands, privileges and easements of other persons and orporations, and the right to erect poles and establish offices, pon making just compensation therefor.

Section 1945 of said Code is the only statute which has at ny time provided for the appointment of commissioners, and hat statute requires *conditions precedent* to such appointment: t provides that all persons, whose estates or interests are to be ffected, may answer and show cause against the condemna-

uires the court to hear the proofs and allegations of , in any and every event *before* appointing commis-

text of section 1945 is as follows:

Section 1945.

5. "*Allegations made against petition; Freeholders appraise estate.* 1871–2, c. 138, s. 15.
esenting such petition to the Superior Court as with proof of service of a copy thereof, and notice l, all or any of the persons whose estates or interests ffected by the proceedings, may answer such petition ause against granting the prayer of the same, and ve any of the facts alleged in it. The court shall ofs and allegations of the parties, and if no sufficient own against granting the prayer of the petition, it an order for the appointment of three disinterested tent freeholders who reside in the county where the e to be appraised, for the purposes of the company, x the time and place for the first meeting of the ers."

er of the Railway Company (record pp. 41 to 54), te defense, measured up to every requirement of mentioned statutes. It (amongst other defenses) varied form, that the roadway of the railroad et wide; it declared in substance that this road- many places very much less than 100 feet broad; too narrow to make it physically possible to con- graph line thereupon in such manner as not to in- ordinary travel. It declared, in effect, that the ed to be constructed by the Telegraph Company sly imperil the running of trains and grossly ob- rdinary use of the railroad. See record, pp, 50–51, 11.

EXTRACT FROM ANSWER OF RAILWAY CO

"11. Further answering, defendant denies 'that the right of way' of this defendant is 'about 100 feet wide, and it extends about 50 feet from a line along the centre between the rails of said main track;' on the contrary, defendant states that the strip of land along which its tracks are laid and its trains are run varies greatly in width at different points along its line, and that at sundry points along said line included in and covered by the condemnation proceedings of the plaintiff is much less than 100 feet in width, indeed, is so narrow that to erect a telegraph line thereupon in the manner set out in said petition would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad, and grossly obstruct or hinder the usual travel thereupon." See record, pp. 50-51.

The Telegraph Company *demurred* to this answer and the court *sustained the demurrer*. When the court sustained the demurrer, it declared in substance that the answer was without merit; that even though the Railway Company might prove all the averments of the answer, by legal and conclusive evidence, yet the Telegraph Company would be entitled to the relief prayed; that the Telegraph Company had the right to condemn a right of way upon the land of the Railway Company.

Notwithstanding the action of the Circuit Court upon the demurrer the Railway Company asked leave to introduce testimony sustaining the averments of its answer, (appearing in the record at pp. 41 to 54) and the court refused to permit the introduction of the testimony—the language of its order of Oct. 24, 1898 (record pp. 58–59) on this point being "and the defendant having asked leave to introduce testimony sustaining the averments of its answer, which leave was refused by the court." See also "Defendants Bill of Exceptions No. 3" record, p. 62.

In a word, the court determined that the Telegraph Company has and had the lawful right to construct its lines upon appellant's railroad, notwithstanding the distinct and definite admission of the Telegraph Company, by its demurrer to defendant's answer, that, as a matter of fact, the strip of land constituting the roadway of the Railroad Company—"is so narrow that to erect a telegraph line thereupon in the manner set out in said petition would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad, and grossly obstruct or hinder the usual travel thereupon." (See record top of p. 51.)

Of course, after sustaining the demurrer to appellant's answer, the court acted logically in refusing to allow appellant "to introduce testimony sustaining the averments of its answer." When the court, upon demurrer, determined that there was no merit in any of the defenses set up in the answer, it probably considered it idle to allow the introduction of testimony establishing facts which the Telegraph Company admitted to be true, and which the court considered insufficient to defeat the rights claimed by the Telegraph Company. But, in adopting this view, *the court closed and ended the case, upon every question raised by the petition and answer*—save and except *the amount of compensation*, which was limited and restricted as hereinbefore set out, and the Railway Company was practically debarred from further defending itself, upon any other ground or question. The Railway, however, was advised, and is to-day advised, that the time had not arrived for battle upon the question of compensation, and would not legally arrive, until the court should first permit it to introduce proofs upon the *precedent* and *jurisdictional* questions raised in its answer, and should pass upon these proofs adversely, holding that they did not sustain and establish these vital defenses.

In every aspect, legal and practical, the questions raised in its answer are vital questions to the appellant. Not only do they concern and determine the existence or non-existence of the right of the Telegraph Company to condemn the property of the railroad, but upon their solution depends appellant's

" exclusive " possession and control of its own roadway so essential to the efficient discharge of its great public duties and obligations.

But appellant is further advised and submits, that the Statutes of North Carolina do not contemplate or provide for any compensation whatever being awarded, under the conditions set forth in its sworn answer; that these statutes do not contemplate or intend that any sum of money, however great, awarded and paid in damages, can authorize the petitioning Telegraph Company to construct and maintain its lines upon the strip of land constituting the roadway of appellant, or properly compensate appellant therefor—if such construction will obstruct or hinder the usual travel on such railroad, or imperil its safe operation, as it is clearly set forth in appellant's answer such construction and maintenance will do.

In the case at bar, not only did the defendant below deny the existence of any statute under which the condemnation of its property for the purposes of the plaintiff could be lawfully conducted and effectuated, but it also averred and offered to prove that its strip of land was of such a character that the telegraph line of the plaintiff could not be so constructed and maintained as not to obstruct or hinder the usual travel on its railroad; nay offered to prove much more than this, to-wit: that its strip of land was so narrow that, to erect a telegraph line thereupon, in the manner set out in said petition, would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad—that is, would grossly imperil the lives of the citizens of the State and of the country at large, travelling upon defendant's railroad trains; and all this might happen without the entry of any further order by the court, which had turned the matter over to its clerk to appoint the commissioners and superintend their sessions; the statute, section 1946 of the Code, authorizing the plaintiff company to take possession of the defendant's property and to construct, maintain and operate its line thereupon, upon payment into court of the sum appraised by the commissioners, upon the filing of their report in the clerk's office.

Just here we submit three questions, to-wit:

(1) Is the issue thus raised and the defense thus interposed in the answer a substantial issue and a valid defense, or not?

(2) Had the defendant, at the time it filed its answer, or will it ever have, the right and opportunity to raise this question and to interpose this defense?

(3) If so, when and where?

Could the defendant, though well aware of the existence of a state of facts which must eventually defeat and render nugatory the entire expensive and vexatious proceeding before commissioners, yet remain silent and allow the court to appoint them and allow them to make their appraisal and report, (for surely such a question cannot be raised before them; neither their oath nor their duties, as defined by the order of September 15, 1898, (pp. 16–17, *supra*) nor their capacities cover or include such a question nor fit them to pass upon it), *and afterwards* take the chances of inducing the court to go back and take up a question which manifestly, in the nature and logic of things, should have been raised and disposed of, *before* all these steps were taken and proceedings had, the defendant having been thoroughly aware from the first that they must come to naught? Nay, under such circumstances it is hardly reasonable to speak of "*the chances*" of the court's hearing the defendant, if he should attempt, *after the coming in of the report*, to raise this obviously antecedent and fundamental question. Upon the general principles which regulate judicial procedure, it is clear the court would not hear the defendant who had thus failed to speak at the proper time, unless this failure was in some proper way explained and condoned. Indeed, if the court will kindly glance at section 1946 of the Code of North Carolina of 1883, (pp. 8-10, *supra*), and then at the order of September 15, '98, (pp. 16–17, *supra*), it will at once perceive that the chart of the commissioners' duties and powers is such that, neither upon the basis of the Code nor of the order, could it be logically possible

to raise before them this issue, as to the defeat of the right to condemn, by the proviso as to obstruction or hindrance to travel.

In short, our view is that a condemnation proceeding, of the character of that under investigation, substantially embraces two separate and successive proceedings—the first of which concerns only and must determine the existence of the right to condemn, and the second is limited to the subsequent inquiry as to the amount of compensation to be paid, for property adjudged in the first proceeding to be liable to condemnation. To the defendant railroad company, the most essential question is, whether it may retain the exclusive possession and control of its roadway, which it regards as indispensible to the safe and efficient discharge of its great public function and duty, or whether it shall be compelled to receive upon its roadway another company which will have independent and antagonistic rights thereon. Any order which determines that question is a final order in that proceeding; the final order, indeed, to the railroad; and the question of the amount of compensation is essentially another and distinct question and issue, triable before another tribunal, after the court has disposed of the prior and graver question, as to the existence of the right to condemn. To such an extent, indeed, did the trial court take this view of the matter, that it actually, and as we claim erroneously, turned over this secondary phase of the proceeding to its clerk, even authorizing him to select and appoint the commissioners.

CLERK APPOINTED COMMISSIONERS.

Proceedings—

Construction of telegraph lines on railway property before any further order of court.

The Circuit Court by its orders of Sept. 15, 1898, and Oct. 24, 1898:

8. Delegated to its Clerk the power of selecting and ap-

pointing commissioners to assess damages and authorized its Clerk to preside over such commissioners.

9. Delegated to its Clerk powers vested in the court and in the court only.

10. Determined that the telegraph company may condemn, take possession of, construct its lines upon, exercise dominion over and use the land of the railway company before the entry of any further order by the court.

The order of September 15th, 1898, (record p. 36 and pp. 16–17 of this brief) provided (amongst other things) as follows: viz:

(a.) "It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district and summons them before him. * * *"

(b.) "The said commissioners shall hold their meetings in the courthouse of the United States, in the City of Greensboro, over which meetings said clerk shall preside, * * *"

(c.) "The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause. * * *"

This order is in direct violation of Section 1945 of the Code of North Carolina which provides (amongst other things) as follows:

"The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the County where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners."

The full text of this section will be found at p. 43 of the record, and (pp. 7–8 of this brief.)

It is respectfully submitted that the Circuit Court could not rightfully delegate its power to appoint commissioners to S. L. Trogdon, Esq., its clerk.

The Selection of commissioners was a matter of vital importance. The statute imperatively required them to be disinterested and competent freeholders. The questions of competency and disinterestedness were important subjects to be considered by the court in the appointment of such commissioners. It would take one of much boldness to contend that an incompetent freeholder should be appointed. It would take one of greater audacity to suggest that an interested freeholder could impartially discharge the duties of a commissioner. The determination, of the competency and disinterestedness of the freeholders to be appointed, was lodged by law, in the sound legal discretion of the court. It was a burden and duty placed upon the court. If a case arose requiring the appointment of commissioners, the court and the court only could make the appointment. If the court could abdicate its important functions in this matter and clothe its clerk with the power of appointment, it could delegate the power to any other officer of its court, to any member of its bar, to an individual at large.

The powers conferred upon S. L. Trogdon, Esq. (Clerk), were never contemplated by the Act of Congress clothing Circuit Courts of the United States with jurisdiction, and providing for the removal of causes from a State to a Federal tribunal. The Constitution of the United States and the statutes made in pursuance thereof contemplated that judicial power and authority should be exercised by the courts of the United States, and not by a private individual even though such private individual might occupy the ministerial position of clerk of the Federal court. When this cause was removed from the State court to the Federal court, the Railway Company had a right to expect that all judicial power should be exercised by the Court and that all orders affecting its rights should be

ade by this tribunal. No constitutional or statutory provision any State conferring judicial power upon clerks of the urts of that State could (under the Constitution and laws of e United States), invest a clerk of a Circuit Court of the nited States with judicial power when a cause is removed om a State to a Federal court.

The order of September 15, 1898, directed that "**the said ommissioners shall hold their meetings in the court-house the United States in the city of Greensboro,**" notwithanding the fact that much of the land of the railway comny, upon which the telegraph company seeks to condemn a ght of way for its purposes, belongs in *fee simple* to the railay company, in which event (as we understand the applicaon of the statute), the provision in the early part of Section 46 of the Code of North Carolina (bottom of p. 8 and top p. 9, *supra*), in respect to said commissioners that "**They all view the premises described in the petition,**" applies th full force.

The requirement of said order that "**said commissioners all hold their meetings in the court-house of the United ates in the city of Greensboro,**" was, if we are right in our nstruction of the law, in disregard of said provision of the tute. It was greatly prejudicial to the rights of the Railway mpany. The case at bar was one in which it was peculiarly cessary that the commissioners should view the premises. e strongest conceivable reasons exist for a view of the preses where a telegraph company seeks by hostile means and e strong arm of the law to condemn a right of way for its rposes along the narrow strip of land constituting the roadd of a railway company. This proposition, capable of ends elaboration, seems too plain to require discussion.

The order of September 15th, 1898, goes further in respect said meetings. It provides that "the said commissioners ll hold their meetings in the court-house of the United ates, in the city of Greensboro, **over which meetings said erk shall preside.**"

The words "said clerk" refer to S. L. Trogdon, Esq., by whom said commissioners were to be appointed.

Where is the authority for the appointment of this presiding officer? The court might as well have appointed a stranger as its clerk. If it had the power to appoint the one, it had the power to appoint the other. The mandate of the statute (in a proper case in regard to the court), is that, it shall make an order for the appointment of three disinterested and competent freeholders. Where is the authority for the enlargement of this body? Where is the authority for adding, not simply a fourth commissioner, but one clothed with the power of a presiding officer? What were to be the powers and duties of this presiding officer? Was he to guide and direct their deliberations? Was he to charge them as the court charges a jury? Were his powers advisory or mandatory? Were the commissioners to defer to his views, or might they follow their own, where a difference of opinion existed? Did he have a vote in fixing the amount of compensation?

The order of September 15th, 1898, record, page 36, provides that "the first meeting of the commissioners * * * shall be held ten days after notice of their appointment has been served on the parties to this cause." Under this order the clerk fixed the time for the first meeting of the said commissioners. By issuing notice at an early or late day, the clerk could have the commissioners to meet at such time as he, in the exercise of his discretion, wisely or unwisely, might determine, while the statute contemplated that the court, in the exercise of a sound legal discretion, should fix the time for the first meeting of the commissioners. The language of the statute conferred this power upon the court. The order, in violation of the statute, delegated this power to a third person.

Clerk Trogdon's Order of September, 19, 1898.

Mr. Trogdon's order of September 19, 1898, appointing commissioners to assess damages was made without notice to or knowledge of the Railway Company.

Alfred M. Scales, John M. Walker, and J. Addison Hodgin:

"Pursuant to an order made by His Honor Chas. H. Simonton, on the day of September, 1898, to me directed, in the above-entitled cause, manding me to summon three disinterested freeholders as Commission- to assess the damage of the said Southern Railway Co., which may ue to same by the reason of the construction of a line of telegraph along right of way by the plaintiff, the Postal Telegraph Cable Co., and a time for the assembling of said commissioners, and the taking of tes- ny bearing upon the issues by them to be tried; I have this day ap- ted as commissioners in said cause, Alfred M. Scales, John M. Walker, J. Addison Hodgin, residents of the county of Guilford, N. C., of such intment you will, therefore, take notice of, and you are hereby sum- ed to appear and sit upon the hearing of the said cause in the court room e U. S. Circuit Court in Greensboro, N. C., on September 30th, 1898, at clock A. M., and herein fail not upon penalty of law.

Done this 19th day of September, 1898, as witness my hand and the seal is court.

(Signed.) SAM'L L. TROGDON,
Clerk."

o opportunity was given the Railway Company to be heard n the selection of these commissioners. The statute sec. 5, (pp. 7–8 *supra*) required the appointment of "disinterested competent freeholders," and the order of the Circuit Court d September 15, 1898, provided: "It is ordered that S. Trogdon, Esq., clerk of this court at Greensboro, North olina, do appoint three disinterested and competent free- lers, resident in this district, and summons them before "; but the order of Mr. Trogdon dated September 19, 8, though reciting upon its face that it was made pursuant ue order of September 15, 1898, "commanding me to sum- three disinterested freeholders as commissioners to assess damage," * * does not purport on its face to appoint nterested and competent freeholders. Mr. Trogdon's er seems to have regarded residence in Guilford County, th Carolina, as the only needed qualification of commis- ers. The fact that Mr. Trogdon mentions residence and s reference to the words "disinterested and competent holders" in the appointing part of his order, seems to y that he attached no weight to the latter qualifications. If,

however, he attached importance to either of the statutory words "disinterested and competent freeholders," his use of the word "disinterested" in the reciting part of his order and omission of the word "competent" leaves the impression that the word "competent" was without meaning to him. A freeholder may be "disinterested" and yet wholly incompetent. The statute contemplated that the court would, in the exercise of a sound legal discretion, appoint disinterested and competent freeholders, after the parties interested had an opportunity to be heard upon these questions. Mr. Trogdon did not appreciate the right of the parties to be heard before the appointment of commissioners. He does not appear to have noticed the word "competent," and presumably he attached no importance to that word, in its legal sense, in his selection of commissioners. He did not in his order declare that the three gentlemen appointed by him were disinterested and competent freeholders. No principle of law requires the presumption that Mr. Trogdon appointed men who were actually disinterested and competent freeholders. If Mr. Trogdon appreciated the meaning of the statutory words and knew the gentlemen appointed to be disinterested and competent freeholders it is fair to presume that he would have stated these facts in his order. In the absence of this statement the presumption is that the gentlemen appointed were *not known* by him to be freeholders, and, as above stated, there is no presumption of law that they measured up to the requirement of being disinterested and competent freeholders

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Appellee's brief filed May 22, 1899, on its motion to dismiss, states in substance (p. 4) that between March 31, 1899, when the Circuit Court of Appeals dismissed appellant's writ of error in this cause and May 5, 1899, when the writ of error was allowed by this Honorable Court and became operative as a supersedeas, the commissioners met and assessed damages; that appellee paid the amount of such damages to the Clerk of the Circuit Court and that appellee then entered upon the

appellant and began and continued the construction of raph lines until stopped by the supersedeas herein.

seems to demonstrate the proposition heretofore by us, namely: that the order of the Circuit Court ctober 24, 1898:

etermined that the Telegraph Company may con- ake possession of, construct its lines upon, exercise on over and use the land of the Railway Company he entry of any further order by the court.

n 1946 of the Code (pp. 8 and 10, *supra*), speaks too upon the proposition just stated to require argument upport.

DOUBT.

-the least—ambiguity or doubt as to whether a statute rants a corporate right, and especially one involving er of Eminent Domain, must be resolved against the ion claiming, by force of the statute, to exercise this rogative. This rule of construction applies with great- when such a statute is invoked by one corporation to e the re-condemnation of property already appropri- der the power of Eminent Domain to another public

ubject is discussed in the following cases:

restern Fertilizing Co., v. *Hyde Park*, 97 U. S., 659.
s River Bridge, v. *Warren*, 12 Curtis, 504.
. Rd. Co., v. *Canal Commrs.*, 21 Pa. St., 22.
ommth., v. *Erie and N. Rd. Co.*, 3 Casey, 351.
Coal Co., v. *Wigton*, 19 Ohio St., 231.
r v. *Marietta & Cin. R. R. Co.*, 11 Ohio St., 231.
y's Case, 2 Blands' Chancery, 99, 100, 129.
t v. *Wallis*, 30 Barbour, 334.
s v. *Clarksburg*, 23 W. Va., 203, 207.
lvania Rd. Co's. Appeal, 93 Pa. St., 150, 159.

CONCLUSION.

y, in closing, we submit in brief some of the consid-

rations in our view properly affecting the *attitude of the court* oward the right claimed by the Telegraph Co., *and the spirit f the construction* which the statute merits, to-wit:

1. The right sought to be exercised involves the construction f statutes conferring a corporate power.

2. The corporate power claimed to be conferred is that of minent Domain.

3. To be exercised against and upon property already appro-riated by the Legislature to a public use.

4. The public use to which the property in question has been ppropriated is one of the most important and vital conceiva-le; constituting the property a great artery along which hrob commerce, the life-blood of the State, and the lives of ier citizens.

5. The new statute, by distinct suggestion, itself, indicates hat the new use is likely to interfere with the old, and if it loes, the consequences may be irreparable, and are certainly ncalculable.

6. Many points concerning the existence and the regulation of the right claimed to be conferred, are involved in doubt and dependent upon the construction of statutes crudely constructed and further complicated by obscure and imperfect reference and inartificial, inconsistent, and inadequate amendment, re-enactment and repeal.

All this enforced by the authorities, from the ablest courts, judges, and text-writers of two continents, emphasizing to the highest and tensest point the duty of strict construction of the statute, and the denial of the right, unless conferred by the Legislature in language too clear to admit of doubt.

Respectfully submitted,

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